

Complaint

IN THE MATTER OF**PAYPAL, INC.**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, THE
GRAMM-LEACH-BLILEY ACT, THE PRIVACY RULE, REGULATION P,
AND THE SAFEGUARDS RULE

Docket No. C-4651; File No. 162 3102
Complaint, May 23, 2018 – Decision, May 23, 2018

This consent order addresses PayPal, Inc.'s peer-to-peer payment service, Venmo, that incorporates a social networking component through a social "news feed" that shares information about a consumer's Venmo transactions. The complaint alleges that PayPal, through its operation of Venmo, has violated Section 5 of the FTC Act and the Gramm-Leach-Bliley Act's Privacy and Safeguards Rules. The consent order prohibits PayPal from making misrepresentations regarding material restrictions, limitations, or conditions to use any payment and social networking service.

Participants

For the *Commission: Gregory A. Ashe, Cora Han, Ben Rossen*
and *Lisa Rothfarb*.

For the *Respondent: Eric Mogilnicki, Covington & Burling*
LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that PayPal, Inc., a corporation, ("Respondent") has violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a); the Privacy of Consumer Financial Information ("Privacy Rule"), 16 C.F.R. Part 313, recodified at 12 C.F.R. Part 1016 ("Reg. P"), and issued pursuant to the Gramm-Leach-Bliley Act ("GLB Act"), 15 U.S.C. §§ 6801-6803; and the Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to Sections 501(b) and 505(b)(2) of the GLB Act, 15 U.S.C. §§ 6801(b), 6805(b)(2); and it appearing to the Commission that this proceeding is in the public interest, alleges:

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1. Respondent PayPal, Inc. is a Delaware corporation with its principal place of business at 2211 North First Street, San Jose, California 95131.

2. Respondent operates Venmo, a payment and social networking application and website that allows consumers to make peer-to-peer payments and to share information regarding such payments through a social network feed.

3. The acts and practices of Respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act.

VENMO’S BUSINESS PRACTICES

Background on the Venmo Peer-to-Peer Payment System

4. Venmo has offered its peer-to-peer payment service to consumers since 2011. The service was previously provided by a Delaware corporation of the same name, and, since an acquisition in 2013, has been provided by Respondent operating as Venmo.

5. Consumers can download the Venmo application (the “app”) onto their mobile devices and use Venmo through its website, Venmo.com. Consumers create a Venmo account to which they may connect external bank accounts, debit cards, or credit cards. The Venmo account can receive money—creating a Venmo “balance”—from other Venmo users or from linked external sources. Consumers can send money from their Venmo balance to other Venmo users, and, if they do not have enough money in their Venmo balance to cover a transaction, the funds are drawn from their attached external account. Consumers can also transfer money from their Venmo balance to their external bank accounts.

6. To initiate a Venmo transaction, a Venmo user may either send money to another Venmo user or submit a “charge request” that asks the recipient to pay money to the requesting user. Users must also include a short message that accompanies each transaction.

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7. As described further below, by default, Venmo publicly shares the names of the participants of a transaction, the date of the transaction, and any accompanying message regarding the transaction on a social news feed on the Venmo service.

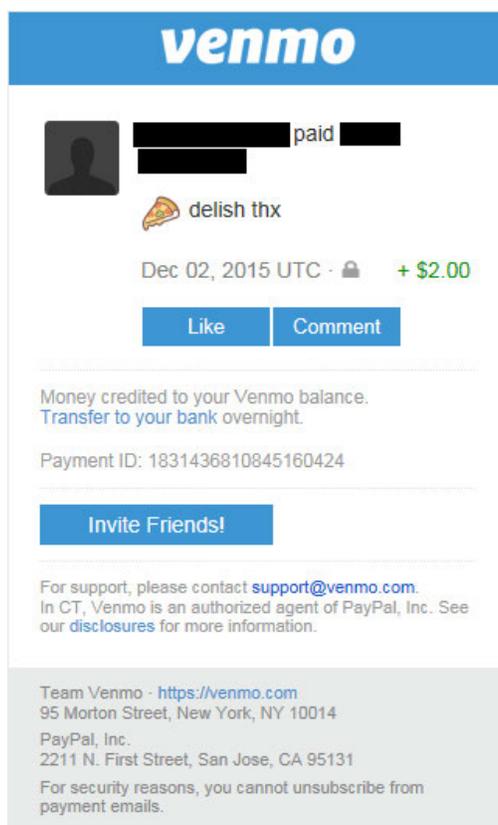
8. As Venmo explains prominently on its website and in mobile application stores, consumers can use the service for a variety of purposes including to “make purchases” and that they can use the service “with anyone.” For example, at various times, the “How it works” page of the Venmo website has stated that consumers can “Use Venmo with anyone,” “Pay anyone with a Venmo account instantly,” and “Pay family and friends” Venmo also has noted that “anyone” includes individuals who are not yet Venmo users.

9. Venmo’s public social network feed is visible on its homepage and has shown consumers conducting transactions such as “tickets,” “baby watching,” “lunch,” “bills,” “rent,” “taxi,” and “iphone repair.”

Venmo’s Representations About Money Transfers

10. When a Venmo user sends money through Venmo to another user, the recipient receives a notification within seconds of the sender initiating the transfer. These notifications appear within the Venmo app, and consumers can additionally choose to receive these notifications via text message, email, or “push notifications” that appear on the screen of the consumer’s mobile device. In numerous instances, the notifications have informed the recipients that they have been paid and they can transfer money to their external bank accounts. For example, at various times, the notifications have read “Money credited to your Venmo balance. Transfer to your bank overnight.” Other notifications have told consumers that someone “paid \$[X] to your Venmo balance [description of transaction.] -- Leave it in Venmo or transfer it to your bank account.” An example of an email notification that Venmo has used appears as follows:

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11. In addition to these transaction-specific representations, Venmo has represented generally that consumers can transfer funds to their bank within a specific time frame, often “overnight.” For example, at various times Venmo’s homepage has stated that consumers who were sent funds through the Venmo system could “cash out to any bank overnight.” Venmo has used a similar description in the Google Play store website, which stated “Transfer money to any bank overnight,” and the Google Play store on consumers’ mobile devices stated “Cash out to any bank overnight.” Similarly, the Venmo description on the Apple store for mobile devices and on the Apple store on consumers’ personal computers has stated “Transfer to any bank overnight.” More recently, Respondent’s “How It Works” page has stated “Quickly transfer money to your bank” and “Move money from Venmo to your bank account in as little as one business day.”

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12. As a result of these representations, many consumers believe that, when they receive payment notifications from Venmo, the funds are ready to be transferred to an external bank account.

Problems Transferring Funds Out of Venmo

13. Despite these claims, in numerous instances, consumers have been unable to transfer funds to their bank accounts as promised. Venmo has waited until a consumer attempts to transfer funds to his or her external bank account to review the transaction for fraud, insufficient funds, or other problems. This review has resulted in Venmo delaying the transfer or reversing the transaction, including in circumstances that the sender is a new user (notwithstanding Venmo's representations that consumers can use Venmo with "anyone"), that the consumer has engaged in a "business transaction" (notwithstanding Venmo's representations that consumers can use Venmo for "purchases"), or that the transaction has involved an amount of money above a certain threshold. In numerous instances, Venmo has required consumers to provide documentation or other information as part of its review. In numerous instances, Venmo has frozen consumers' accounts during the review. When Venmo reverses a transaction, it removes the funds from that transaction from the consumer's Venmo balance.

14. Despite its claims that money has been credited and can be transferred to consumers' external bank accounts, Venmo has not verified or approved consumer transactions until after consumers have initiated a transfer of funds to an external account, which could result in either substantial delays in the transfer or the reversal of the transaction. Venmo has failed to disclose this fact.

Venmo Was Aware of Consumer Confusion

15. Many thousands of consumers have complained to Venmo about the delays or loss of funds from their Venmo balance when they tried to transfer funds to their bank accounts. News articles from several media outlets since at least 2015 have highlighted the harm to consumers, which is sometimes in the thousands of dollars. Many consumers have reported suffering significant

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financial hardship due to not being able to transfer funds, including the inability to pay rent or bills with funds they expected to transfer out of Venmo. Other consumers have relied on the notifications indicating a sender paid them and supplied event tickets or other valuable items to the sender in exchange for funds, and consequently incurred a financial loss when Venmo removed the funds from their balance. In numerous instances, consumers who have attempted to contact Venmo have been unable to reach a representative or have not been provided with an explanation for or resolution to the problem with their account.

16. Internal company emails also have demonstrated that at least as early as mid-2015 Venmo was aware of “user frustration” and confusion experienced by consumers whose accounts were frozen or who suffered financial loss when transactions were reversed. Nevertheless, Venmo has continued representing, without qualification, that once money is credited to consumers’ Venmo accounts, consumers can transfer the money to their bank accounts.

Venmo’s Representations About Privacy

17. By default, all peer-to-peer transactions on Venmo are displayed on the Venmo social news feed. On this news feed, Respondent displays the names of the payer and recipient, the date of the transaction, and a message written by the user that initiated the transaction, to anyone using Respondent’s service. In addition, each Venmo user has a profile page on Respondent’s website that lists the user’s Venmo transactions. A user’s five most recent public Venmo transactions are visible, by default, to anyone who views the user’s Venmo web page, including to visitors who do not have a Venmo account.

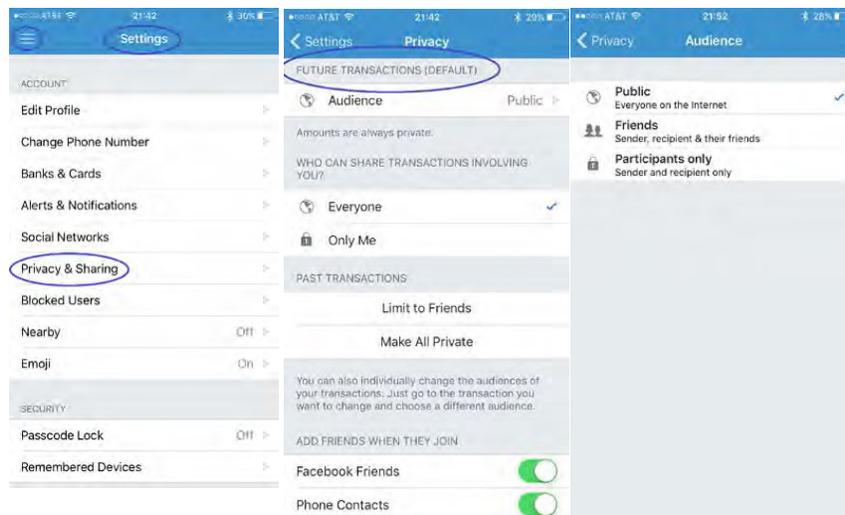
18. Consumers who do not want to share their Venmo transactions may restrict the visibility of their transactions through privacy settings available in a “Settings” menu or by configuring settings for an individual transaction.

19. Consumers who wish to generally restrict the visibility of all of their future transactions may do so through Venmo’s “Settings” menu. To ensure that all payments remain private, a

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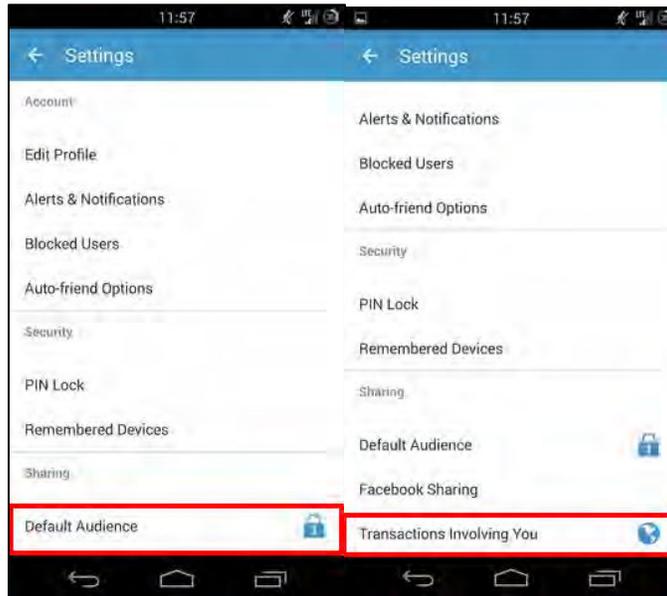
consumer must change two similarly labeled settings. The first setting in this menu limits the “default audience” for “future transactions” (hereinafter, the “Default Audience Setting”). A second setting, described in more detail below, controls “who can share transactions involving” the Venmo user (hereinafter, the “Transaction Sharing Setting”). Although these two settings appear on the same screen on both the iOS and the web-based version of the service, on some Android devices the Transaction Sharing Setting is only accessible if the user scrolls down below the Default Audience Setting.

20. On Venmo’s iOS app, privacy settings are accessible from a “Settings” menu, the same or similar to the one depicted below, from which a user may select “Privacy & Sharing.” The Default Audience Setting is labeled “Future Transactions (Default).” The Transaction Sharing Setting is labeled “Who Can Share Transactions Involving You?”

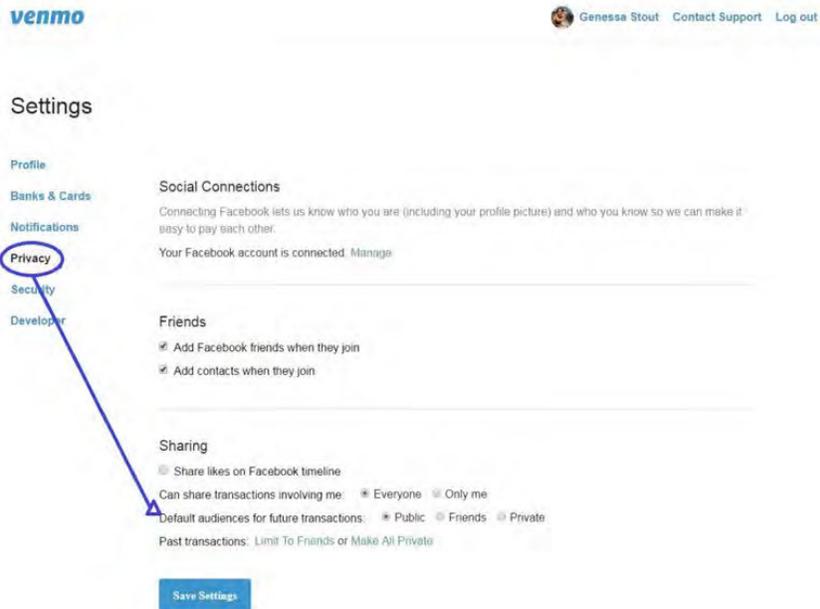


21. On Venmo’s Android App, the privacy settings menu appears the same or similar to the screenshots depicted below:

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22. On the Venmo webpage, the privacy settings menu appears the same or similar to the screenshot depicted below:



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23. The Default Audience Setting purports to allow the user to select the “audience” for all future transactions. It contains three options, identified as:

- a. Public (Everyone on the Internet);
- b. Friends (Sender, recipient & their friends); and
- c. Participants only (Sender and recipient only).

24. The label describing the Default Audience Setting would lead a reasonable consumer to believe that she could limit the visibility of all of her future transactions by restricting this setting. Thus, a consumer who sets the Default Audience Setting to “Participants Only” would likely assume that, by default, all of her transactions will be viewable only by the participants of the transaction, regardless of whether she is the initiator or recipient of a transaction.

25. In fact, however, a consumer must also change Venmo’s second setting, the Transaction Sharing Setting, in order to ensure that all of her transactions are private. As depicted in the screenshots above, the Transaction Sharing Setting contains two options: “Everyone” or “Only Me.” By default, it is set to “Everyone.” If a consumer fails to change the Transaction Sharing Setting to “Only Me,” some of her transactions will still be published publicly even if she has chosen a “private” default audience through the Default Audience Setting.

26. For example, suppose User A changes the Default Audience Setting to “Participants Only” but does not change the Transaction Sharing Setting to “Only Me.” User B, meanwhile, leaves the Default Audience Setting set to “Public” and the Transaction Sharing Setting set to “Everyone.” This configuration has the effect of overriding User A’s clearly expressed privacy preferences in at least two ways:

- a. First, this configuration does not affect the privacy of any transactions where User A is the *recipient* of a transaction rather than the *initiator*. Thus, if User A sends a payment to User B, the transaction will be

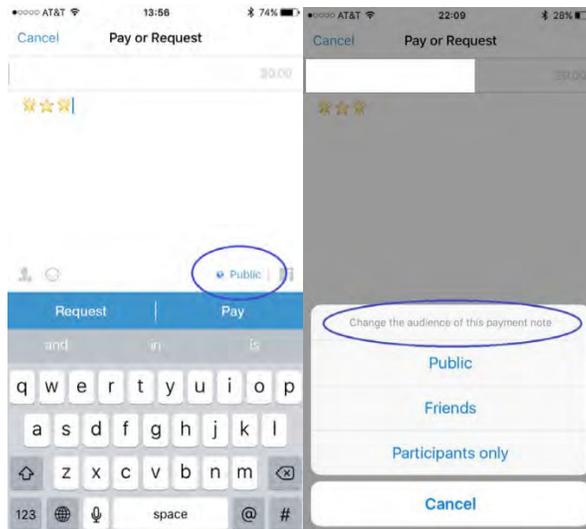
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visible only to the participants, but if User B sends a payment or a charge request to User A, the transaction will be public and show User A as a recipient of User B's public transaction.

- b. Second, even where User A initiates a private transaction, this configuration permits User B to retroactively make that transaction publicly viewable at any time after the transaction is complete, without providing any notice to User A.

27. Venmo has not informed consumers that the Transaction Sharing Setting permits another Venmo user to override the consumer's default audience or to retroactively make a private transaction public. These results are directly contrary to the expectations of a reasonable consumer.

28. Venmo also allows consumers to change the audience for individual transactions without engaging with the "Settings" menu. Thus, if a user only wants a particular transaction to be kept private, she could change the audience setting for an individual transaction at the time she sends a payment (hereinafter, the "Individual Audience Setting"). On Venmo's iOS app, the Individual Audience Setting appears the same or similar to the screenshot depicted below:



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29. As with the Default Audience Setting, the Individual Audience Setting does not ensure that a transaction remains private unless a user has separately changed the Transaction Sharing Setting to “Only Me.” If a user has not changed both settings, the other participant in the transaction may retroactively make the transaction public, as described in Paragraph 26(b).

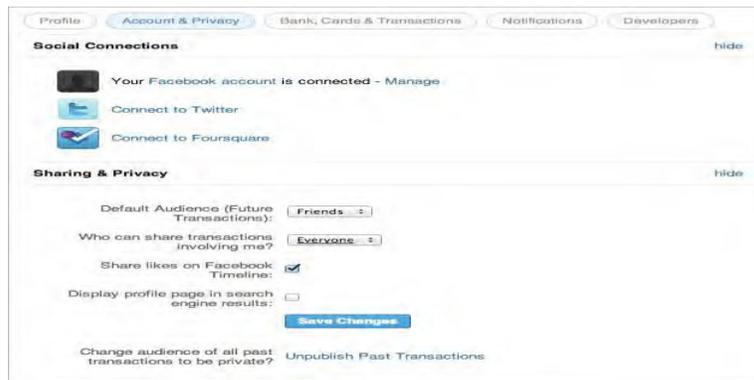
30. Venmo has never informed consumers that the Transaction Sharing Setting permits retroactive changes to the visibility of a transaction, even where one participant has specifically intended for a transaction to be private. In fact, Venmo exacerbates these problems by incorrectly describing its privacy settings in its Privacy FAQs. For example, until at least December 2015, as depicted below, Venmo’s Privacy FAQ included a graphic that incorrectly described the settings necessary to make a user’s transactions private. Specifically, the graphic only restricts the Default Audience Setting while leaving the Transaction Sharing Setting unchanged.

FUTURE PAYMENTS

You can set up your Venmo account so that all future payments are private, to do so, follow these instructions:

- Log in to venmo.com
([/web/20150525161659/https://venmo.com/](https://web/20150525161659/https://venmo.com/))
- Navigate to **Account -> Account & Privacy -> Sharing & Privacy -> Edit**
- Choose your desired settings
- **Save**

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31. In addition, in early 2017, Venmo revised this Privacy FAQ to state that “[s]etting your default audience to “Private” or “Participants Only” will ensure that your payments are only visible to you and the other participant in the payment.” As described in paragraphs 25, 26 and 30, this statement is false.

Venmo’s Representations About Security

32. Venmo has disseminated public statements on its mobile app and website about its information security practices, including the following:

- a. “Venmo uses bank-grade security systems and data encryption to protect your financial information.”
- b. “Venmo uses bank grade security systems and data encryption to protect you and guard against unauthorized transactions and access to your personal or financial information.”

33. Despite these representations, until approximately March 2015, Venmo failed to implement sufficient safeguards to protect the security, confidentiality, and integrity of consumer information. For example, Venmo failed to provide consumers with security notifications regarding changes to account settings from within the consumer’s Venmo account, including informing a consumer that her password or e-mail address had changed, that a new email address had been added, or that a new device was added to her account. As a result, in some instances, unauthorized users successfully took over consumer accounts, changed the

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passwords and/or e-mail addresses associated with the accounts, and withdrew funds out of the accounts – all without any notifications to the affected consumers.

34. In addition, due to Venmo’s failure to maintain adequate customer support capabilities, as noted above in Paragraph 15, Venmo was often slow to respond to reports of unauthorized transactions.

VENMO’S GRAMM-LEACH-BLILEY ACT VIOLATIONS

35. Respondent is a financial institution, as that term is defined by Section 509(3)(A) of the Gramm-Leach-Bliley (“GLB”) Act, 15 U.S.C. § 6809(3)(A), and is subject to the GLB Act. The GLB Act defines a financial institution as “any institution the business of which is engaging in financial activities as described in Section 1843(k) of Title 12 (The Bank Holding Company Act of 1956).” 15 U.S.C. § 6809(3)(A). Among other things, Respondent is significantly engaged in “transferring money,” one of the activities listed as financial in nature under the Bank Holding Company Act of 1956, 12 U.S.C. § 1843(k)(A). Respondent is also significantly engaged in data processing and transmission, financial activities listed by the Consumer Financial Protection Bureau (“CFPB”) in Regulation Y, 12 C.F.R. § 225.28(b)(14), as covered by GLB. Respondent collects nonpublic personal information, as defined by 16 C.F.R. § 313.3(n). Because Respondent is a financial institution that collects nonpublic personal information, during the relevant time period it was subject to the requirements of the GLB Privacy Rule, 16 C.F.R. § 313.1 *et seq.*, and is subject to the requirements of Reg. P, 12 C.F.R. Part 1016, and the GLB Safeguards Rule, 16 C.F.R. § 314.1 *et seq.*

Privacy Rule and Reg. P

36. The Privacy Rule, which implements Sections 501-503 of the GLB Act, 15 U.S.C. §§ 6801-6803, was promulgated by the Commission on May 24, 2000, and became effective on July 1, 2001. *See* 16 C.F.R. Part 313. Since the enactment of the Dodd-Frank Act on July 21, 2010, the CFPB became responsible for implementing the Privacy Rule, and accordingly promulgated the

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Privacy of Consumer Financial Information, Regulation P, 12 C.F.R. Part 1016 (“Reg. P”), which became effective on October 28, 2014. Accordingly, Respondent’s conduct is governed by the Privacy Rule prior to October 28, 2014, and by Reg. P after that date. The GLB Act authorizes both the CFPB and the FTC to enforce Reg. P. 15 U.S.C. § 6805.

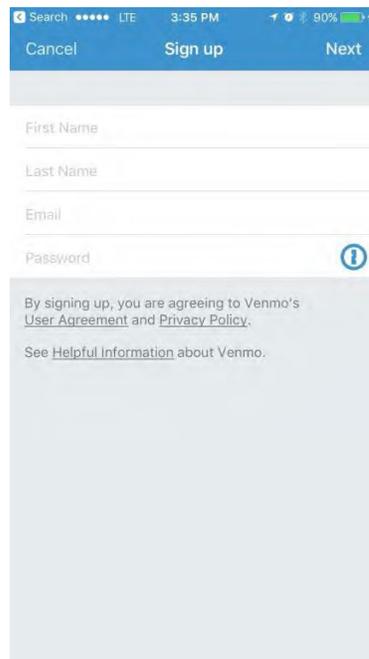
37. Both Reg. P and the Privacy Rule require financial institutions to provide customers with an initial and annual privacy notice. Among other things:

- a. These privacy notices must be “clear and conspicuous.” 16 C.F.R. §§ 313.4 and 313.5; 12 C.F.R. §§ 1016.4 and 1016.5. “Clear and conspicuous means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information in the notice.” 16 C.F.R. § 313.3(b)(1); 12 C.F.R. § 1016.3(b)(1);
- b. These privacy notices must “accurately reflect[] [the financial institution’s] privacy policies and practices.” 16 C.F.R. § 313.4 and 313.5; 12 C.F.R. §§ 1016.4 and 1016.5. They must include specified elements, including the categories of nonpublic personal information the financial institution collects and discloses, the categories of third parties to whom the financial institution discloses the information, and the security and confidentiality policies of the financial institution. 16 C.F.R. § 313.6; 12 C.F.R. § 1016.6; and
- c. These privacy notices must be provided “so that each consumer can reasonably be expected to receive actual notice.” 16 C.F.R. § 313.9; 12 C.F.R. § 1016.9. For example, for the consumer who conducts transactions electronically, a financial institution may require the consumer to acknowledge receipt of the initial notice as a necessary step to obtaining the financial product or service. 16 C.F.R. § 313.9(b)(1)(iii); 12 C.F.R. § 1016.9(b)(1)(iii).

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38. Venmo has failed to comply with the requirements described in Paragraph 37 since it began providing its mobile payment service in 2011. Specifically:

- a. Venmo failed to provide a clear and conspicuous initial privacy notice to its customers. Rather, at all times relevant to the complaint, users of Venmo's mobile applications have seen a screen during the signup process the same as or similar to the screenshot depicted below:



This screen informs users that “[b]y signing up, you are agreeing to Venmo’s User Agreement and Privacy Policy.” As shown in the screenshot above, this disclosure is printed in grey text on a light grey background and does not provide a clear and conspicuous initial privacy notice designed to call attention to the nature and significance of the information in the notice, as required by the Privacy Rule and Reg. P;

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- b. Venmo's privacy notice is not accurate, as required by the Privacy Rule and Reg P. Venmo represents in its Privacy Policy that it shares a user's personal information with the user's "social web, if [the user's] Venmo account transactions are designated as 'public' or friends-only payments" In fact, as described in Paragraphs 17-23, Venmo shares a consumer's personal information by default with "everyone on the Internet," including persons who do not have a Venmo account, and not just members of the consumer's "social web"; and
- c. Venmo has failed to deliver the initial privacy notice so that each customer could reasonably be expected to receive actual notice, as required by the Privacy Rule and Reg P. For example, users of Venmo's mobile app may click on a link to Venmo's Privacy Policy to find a description of the company's practices regarding the collection and sharing of personal information, including personal financial information, but Venmo does not require customers to acknowledge receipt of an initial privacy notice as a necessary step to obtaining a particular financial product or service.

Safeguards Rule

39. The Safeguards Rule, which implements Section 501(b) of the GLB Act, 15 U.S.C. § 6801(b), requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including: (1) designating one or more employees to coordinate the information security program; (2) identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks; (3) designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures; (4) overseeing service

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providers and requiring them by contract to protect the security and confidentiality of customer information; and (5) evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.16 C.F.R. §§ 314.3 and 314.4. Violations of the Safeguards Rule are enforced through the FTC Act. 15 U.S.C. § 6805(a)(7).

40. Until approximately March 2015, Venmo failed to comply with the requirements described in Paragraph 39. Specifically,

- a. Through at least August 2014, Venmo failed to have a written information security program;
- b. Until at least September 2014, Venmo failed to assess reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information; and
- c. Until approximately March 2015, Venmo failed to implement basic safeguards to protect the security, confidentiality, and integrity of consumer information, including:
 - i Failing to provide security notifications to consumers, such as notifications that a consumer's password or e-mail address has changed, or that a new device was added to the consumer's account; and
 - ii Failing to maintain adequate customer support to timely investigate and respond to users' reports concerning account compromise or unauthorized transactions.

VIOLATIONS OF THE FTC ACT**COUNT I**

41. Through the means described in Paragraphs 4 – 16, Respondent, through Venmo, has represented, directly or

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indirectly, expressly or by implication, that money is credited to a consumer's Venmo account and can be transferred to an external bank account.

42. In fact, in numerous instances in which Respondent has made the representation set forth in Paragraph 41, Respondent has failed to disclose or disclose adequately to consumers that funds could be frozen or removed because Respondent has not yet approved the underlying transaction. This additional information would be material to consumers in their decision to use Respondent's payment and social networking service.

43. Respondent's failure to disclose or disclose adequately the material information described in Paragraph 42, in light of the representation described in Paragraph 41, is a deceptive act or practice.

COUNT II

44. As described in Paragraphs 17 – 24, 27, and 30 – 31, Respondent, through Venmo, has represented, directly or indirectly, expressly or by implication, that through the Default Audience Setting, consumers can restrict the visibility of future transactions to specific groups, such as "Participants Only" or "Friends."

45. Respondent failed to disclose, or failed to disclose adequately, that the Default Audience Setting does not ensure that future transactions are visible only to friends or to the participants of the transaction, as described in Paragraphs 25 – 26. This fact would be material to consumers in their decision to use Respondent's services.

46. Respondent's failure to disclose or disclose adequately the material information described in Paragraph 45, in light of the representation set forth in Paragraph 44, is a deceptive act or practice.

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COUNT III

47. As described in Paragraphs 17 – 24, 28, and 30 – 31, Respondent, through Venmo, has represented, directly or indirectly, expressly or by implication, that through the Individual Audience Setting, consumers can restrict the visibility of any single transaction to specific groups, such as “Participants Only” or “Friends.”

48. Respondent failed to disclose, or failed to disclose adequately, that the Individual Audience Setting does not ensure that any single transaction is visible only to friends or to the participants of the transaction, as described in Paragraph 29. This fact would be material to consumers in their decision to use Respondent’s services.

49. Respondent’s failure to disclose or disclose adequately the material information described in Paragraph 48, in light of the representation set forth in Paragraph 47, is a deceptive act or practice.

COUNT IV

50. As described in Paragraph 32, Respondent, through Venmo, has represented, directly or indirectly, expressly or by implication, that Respondent protected consumers’ financial information with “bank grade security systems.”

51. In fact, as described in Paragraphs 33 – 34, Respondent did not secure consumers’ financial information with “bank grade security systems.” Therefore, the representation set forth in Paragraph 50 is false or misleading.

VIOLATION OF THE PRIVACY RULE AND REG. P**COUNT V**

52. As described in Paragraphs 36 – 37, the Privacy Rule and Reg. P require financial institutions to provide customers with a clear and conspicuous initial privacy notice that accurately reflects the financial institution’s privacy policies and practices,

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and to deliver the privacy notice so that each customer could reasonably be expected to receive actual notice.

53. Respondent is a financial institution, as defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).

54. As described in Paragraph 38, Respondent, through Venmo, did not provide users with a clear and conspicuous initial privacy notice. Therefore, Respondent violated the Privacy Rule, 16 C.F.R. § 313.4(a), and Reg. P, 12 C.F.R. § 1016.4.

55. As described in Paragraph 38, Respondent, through Venmo, has disseminated an initial privacy notice that does not accurately reflect its policies and practices in violation of the Privacy Rule, 16 C.F.R. § 313.4(a), and Reg. P, 12 C.F.R. § 1016.4(a).

56. As described in Paragraph 38, Respondent, through Venmo, failed to deliver the initial privacy notice so that each customer could reasonably be expected to receive actual notice. Therefore, Respondent violated the Privacy Rule, 16 C.F.R. § 313.9, and Reg. P, 12 C.F.R. § 1016.9.

VIOLATION OF THE SAFEGUARDS RULE**COUNT VI**

57. As described in Paragraph 39, the Safeguards Rule requires financial institutions to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, alteration, destruction or other compromise of such information and then design and implement information safeguards to control the risks identified through the risk assessment.

58. Respondent is a financial institution, as defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).

Decision and Order

59. As set forth in Paragraph 40, Respondent, through Venmo, failed to have a written comprehensive information security program until approximately August 2014;

60. As set forth in Paragraph 40, Respondent, through Venmo, failed to assess reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information until approximately September 2015; and

61. As set forth in Paragraph 40, Respondent, through Venmo, failed to implement safeguards to protect the security, confidentiality, and integrity of consumer information until at least March 2015.

62. Therefore, the conduct set forth in Paragraphs 59 – 61 is a violation of the Safeguards Rule, 16 C.F.R. § 314.4.

63. The acts and practices of Respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act.

THEREFORE, the Federal Trade Commission this twenty-third day of May, 2018, has issued this complaint against Respondent.

By the Commission.

DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of certain acts and practices of Respondent named in the caption. The Commission’s Bureau of Consumer Protection (“BCP”) prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft

Decision and Order

Complaint would charge Respondent with violation of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order (“Consent Agreement”). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission’s Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

FINDINGS

1. Respondent PayPal, Inc., operating as Venmo, is a Delaware corporation with its principal office or place of business at 2211 North First Street, San Jose, California 95131.
2. The Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

Decision and Order

DEFINITIONS

For purposes of this Order, the following definitions apply:

- A. “Clearly and conspicuously” means that a required disclosure is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:
1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure (“triggering representation”) is made through only one means.
 2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
 3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
 4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.
 5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

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6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.
 7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
 8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.
- B. “Close proximity” means that the disclosure is very near the triggering representation. For example, a disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation.
- C. “Covered information” means information from or about a User, including: (a) a first and last name; (b) a physical address; (c) an email address or other online contact information, such as a user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a financial institution account number; (g) credit or debit card information; or (h) transaction information.
- D. “Privacy setting” shall include any control or setting provided by Respondent that allows a user to limit or restrict which individuals or entities can access or view covered information.
- E. “Respondent” means PayPal, Inc. and its successors and assigns.
- F. “Transaction information” means information from or about a Payment and Social Networking Service transaction, including (a) the participants to the transaction; (b) the date of the transaction; or (c) any

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accompanying message or other descriptor related to the transaction.

- G. “User” means any person with a Payment and Social Networking Service account.
- H. “Payment and Social Networking Service” means any app or website owned and operated by Respondent that allows consumers to make payments and to share information regarding such payments with other Users through a social network owned and operated by Respondent.
- I. “Venmo” means the wholly or partially owned subsidiary, unincorporated division or business unit, or affiliate of PayPal, Inc., however denominated, that operates the Payment and Social Networking Service currently branded as Venmo.

ORDER**I. PROHIBITED MISREPRESENTATIONS**

IT IS ORDERED that Respondent, and Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, sale, or use of any Payment and Social Networking Service must not misrepresent or assist others in misrepresenting, expressly or by implication:

- A. Any material restriction, limitation, or condition to use any Payment and Social Networking Service; and
- B. The extent to which Respondent, in connection with any Payment and Social Networking Service, protects the privacy, confidentiality, security, or integrity of any covered information, including:

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1. The extent to which a consumer may exercise control over the disclosure of any covered information from or about a User and the steps a User must take to implement any such controls; and
2. The extent to which Respondent implements or adheres to a particular level of security.

II. REQUIRED DISCLOSURES**IT IS FURTHER ORDERED** that:

- A. Within one hundred and fifty (150) days of the effective date of this Order, Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, when making any representation through any Payment and Social Networking Service, expressly or by implication, about the availability of funds to be transferred or withdrawn to a bank account (1) must disclose, clearly and conspicuously, and in close proximity to such representation (a) that the transaction is subject to review and (b) the fact, if true, that funds could be frozen or removed as a result of transaction reviews performed during the bank transfer or withdrawal process, and (2) the representation must not be otherwise misleading.
- B. Respondent must issue a notice to Users, within one hundred and fifty (150) days of the effective date of this Order as follows: (i) for Users who have installed a Payment and Social Networking Service as an app, through the app such that the notice appears when the User next opens the app or (ii) for Users who have not installed a Payment and Social Networking Service as an app, through a text message, email, or other communication sufficient to provide clear and conspicuous notice prior to the User's next transaction.

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The notice shall disclose, clearly and conspicuously, and separate and apart from any “privacy policy,” “terms of use,” “end user license agreement,” or similar document, the fact, if true, that when a User attempts to transfer or withdraw funds to a bank account, Respondent (1) will perform transaction reviews, and (2) based on such review, may (i) block or delay the transfer or withdrawal, and/or (ii) reverse a payment transaction.

III. ADDITIONAL PRIVACY DISCLOSURES

IT IS FURTHER ORDERED that, within one hundred and fifty (150) days of the effective date of this Order, and continuing thereafter, Respondent and Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with any Payment or Social Networking Service, must clearly and conspicuously disclose to each User, through the Payment and Social Networking Service, and separate and apart from any “privacy policy,” “terms of use,” “blog,” “helpful information” page, or similar document: (1) how the User’s transaction information will be shared with other Users; and (2) how the User can use privacy settings to limit or restrict the visibility or sharing of the User’s transaction information on the Payment and Social Networking Service. For Users that have already created an account when this disclosure is first issued, this disclosure must occur at or immediately prior to the time that the User next engages in a transaction through the Payment and Social Networking Service. For Users that have not created an account when this disclosure is first issued, this disclosure must occur at the time the User opens an account. This disclosure must not contain any other information.

IV. GLB RULE PROVISIONS

IT IS FURTHER ORDERED that Respondent, and Respondent’s officers, agents, employees and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or

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indirectly, in connection with any Payment and Social Networking Service, are hereby permanently restrained and enjoined from violating any provision of:

- A. The Privacy of Consumer Financial Information Rule (Regulation P), 12 C.F.R. Part 1016; or
- B. The Standards for Safeguarding Consumer Information Rule, 16 C.F.R. Part 314.

In the event that any of the statutory sections or rules identified in this Part are hereafter amended or modified, compliance with that statutory section or rule as so amended or modified shall not be a violation of this Order.

V. BIENNIAL ASSESSMENT REQUIREMENTS

IT IS FURTHER ORDERED that Respondent, and its successors and assigns, in connection with their compliance with Section IV(A) and (B) of this Order, shall obtain initial and biennial assessments and reports (“Assessments”) of the Venmo Payment and Social Networking Service from a qualified, objective, independent third-party professional, using procedures and standards generally accepted in the profession. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the Order for the initial Assessment, and (2) each two-year period thereafter for ten (10) years after service of this Order for the biennial Assessments. Each Assessment shall:

- A. Set forth the specific administrative, technical, and physical safeguards that Respondent has implemented and maintained during the reporting period;
- B. Explain how such safeguards are appropriate to Respondent’s size and complexity, the nature and scope of Respondent’s activities, and the sensitivity of the covered information collected from or about consumers;

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- C. Explain how the safeguards that have been implemented meet or exceed the protections required by Section IV(B) of this Order; and
- D. Certify that Respondent's security program(s) is operating with sufficient effectiveness to provide reasonable assurance that the confidentiality, security, and integrity of covered information is protected and has so operated throughout the reporting period.

Each Assessment must be completed within 60 days after the end of the reporting period to which the Assessment applies. The Assessment must be obtained from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. A professional qualified to prepare such Assessments must be: an individual qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); an individual holding Global Information Assurance Certification (GIAC) from the SANS Institute; or a qualified individual or entity approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

Respondent must submit the initial Assessment to the Commission within 10 days after the Assessment has been completed. Respondent must retain all subsequent biennial Assessments, at least until the Order terminates. Respondent must submit any biennial Assessments to the Commission within 10 days of a request from a representative of the Commission.

VI. ACKNOWLEDGMENTS OF THE ORDER

IT IS FURTHER ORDERED that Respondent obtains acknowledgments of receipt of this Order:

- A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

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- B. For 20 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.
- C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 60 days, a signed and dated acknowledgment of receipt of this Order.

VII. COMPLIANCE REPORTS AND NOTICES

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

- A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order

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obtained pursuant to this Order, unless previously submitted to the Commission.

- B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that provides a Payment and Social Networking Service.
- C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.
- D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____” and supplying the date, signatory’s full name, title (if applicable), and signature.
- E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re PayPal.

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VIII. RECORDKEEPING

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

- A. accounting records showing the revenues from all Payment and Social Networking Services sold;
- B. personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;
- C. copies or records of all consumer complaints regarding any Payment and Social Networking Service, whether received directly or indirectly, such as through a third party, and any response;
- D. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;
- E. a copy of each unique Payment and Social Networking Service advertisement or other marketing material making a representation subject to this Order; and
- F. for 3 years after the date of preparation of each Assessment required by this Order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of Respondent, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Respondent's compliance with related Provisions of this Order, for the compliance period covered by such Assessment.

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IX. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

- A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.
- B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.
- C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

X. ORDER EFFECTIVE DATES

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on May 23, 2038, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

Analysis to Aid Public Comment

- A. Any Provision in this Order that terminates in less than 20 years;
- B. This Order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from PayPal, Inc. ("PayPal").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

Analysis to Aid Public Comment

This matter involves Venmo, a peer-to-peer payment service owned and operated by PayPal. Venmo has offered its peer-to-peer payment service to consumers since 2011, and was acquired by PayPal in 2013. Consumers can use Venmo to transfer money to one another using a mobile application or through a website at www.venmo.com. Venmo's payment service incorporates a social networking component through a social "news feed" that shares information about a consumer's Venmo transactions.

The Commission's proposed complaint alleges that PayPal, through its operation of Venmo, has violated Section 5 of the FTC Act and the Gramm-Leach-Bliley ("GLB") Act's Privacy and Safeguards Rules.

First, the proposed complaint alleges that Venmo has represented to consumers that money is credited to their Venmo account and can be transferred to an external bank account after other Venmo users have sent funds to those consumers, but has failed to disclose, or failed to disclose adequately, that funds could be frozen or removed because Venmo has not yet approved the underlying transaction. As alleged in the proposed complaint, Venmo has made representations to consumers that they have been paid and they can transfer money from Venmo to an external bank account. For example, Venmo has sent users notifications that have stated "Money credited to your Venmo balance. Transfer to your bank overnight." Despite these claims, the proposed complaint alleges that, in numerous instances, consumers have been unable to transfer funds to their bank accounts as promised. Venmo has waited until a consumer attempts to transfer funds to an external bank account to review the transaction for certain issues. This review has resulted in Venmo delaying the transfer or reversing the transaction in numerous instances.

Second, the proposed complaint alleges that Venmo has failed to disclose material information to consumers about the operation of Venmo's privacy settings. As alleged in the proposed complaint, by default, all Venmo transactions are shared on Venmo's social news feed, which displays the names of the payer and recipient, the date of the transaction, and a message written by the user that initiated the transaction. Venmo offers privacy

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settings that consumers can use to limit the visibility of their transactions. However, to ensure that all future payments remain private, a consumer must change two similarly labeled settings. The first setting, referred to in the proposed complaint as the “Default Audience Setting,” would lead a reasonable consumer to believe that they can restrict the visibility of their future transactions on the news feed to specific groups, such as “Participants Only” or “Friends.” In fact, however, a consumer must also change a second setting, referred to in the proposed complaint as the “Transaction Sharing Setting,” to ensure that all of her transactions are private. If a consumer fails to restrict this second setting, in some circumstances, transactions will still be published publicly even if the consumer has chosen a “private” default audience.

Venmo also offers a privacy setting to control the visibility of an individual transaction, referred to in the proposed complaint as the “Individual Audience Setting.” The proposed complaint alleges that Venmo failed to disclose, or failed to disclose adequately, that the Individual Audience Setting does not ensure that an individual transaction remains private unless a consumer also separately restricts the Transaction Sharing Setting described above. If a consumer has not changed both settings, there are circumstances where the other participant in the transaction can retroactively change a transaction from private to public.

Third, the proposed complaint alleges that Venmo represented until approximately March 2015 that it protected consumers’ financial information with “bank grade security systems” but in fact failed to implement basic safeguards necessary to secure consumer accounts from unauthorized transactions and did not provide “bank grade security.” For example, Venmo failed to provide consumers with security notifications about changes to account settings from within the consumer’s Venmo account, such as when a consumer’s email address or password had been changed. The proposed complaint alleges that Venmo’s representation that it provided “bank grade security systems” constitutes a deceptive act or practice under Section 5 of the FTC Act.

Analysis to Aid Public Comment

Fourth, the proposed complaint alleges that Venmo violated the GLB Act's Privacy Rule and Regulation P by failing to provide users with a clear and conspicuous initial privacy notice, disseminating an initial privacy notice that does not accurately reflect its policies and practices, and failing to deliver the initial privacy notice so that each customer could reasonably be expected to receive actual notice.

Finally, the proposed complaint alleges that Venmo violated the GLB Act's Safeguards Rule by failing to have a comprehensive written information security program before August 2014, failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks before September 2014, and failing to design and implement information safeguards to control the known risks to the security, confidentiality, and integrity of customer information.

The proposed order contains injunctive provisions addressing the alleged deceptive conduct and Rule violations in connection with PayPal's operation of a payment and social networking service. Part I of the proposed order prohibits PayPal from making misrepresentations regarding material restrictions, limitations, or conditions to use any payment and social networking service. It also prohibits misrepresentations about data security and privacy, including misrepresentations regarding the extent of control provided by any privacy settings and the extent to which PayPal implements or adheres to a particular level of security.

Part II of the proposed order requires PayPal, when making any representations through any payment and social networking service about the availability of funds to be transferred or withdrawn to a bank account, to provide clear and conspicuous disclosures that transactions are subject to review and, if true, that funds could be frozen or removed as a result of transaction reviews. Part II also requires PayPal to issue a one-time notice informing current Venmo users that when they attempt to transfer or withdraw funds to a bank account, Venmo will perform

Analysis to Aid Public Comment

transaction reviews and based on such review, may block or delay the transfer or withdrawal, and/or reverse a payment transaction.

Part III of the proposed order requires PayPal to provide clear and conspicuous disclosures to users related to how any payment and social networking service shares transaction information with other users and how a consumer can limit the visibility or sharing of transaction information through privacy settings.

Part IV of the agreement prohibits violations of the GLB Privacy and Safeguards Rules.

Part V requires PayPal to obtain biennial data security assessments for ten years.

Parts VI through IX of the proposed order are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring PayPal to provide information or documents necessary for the Commission to monitor compliance. Part X states that the proposed order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

**NORTHROP GRUMMAN CORPORATION
AND
ORBITAL ATK, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT*Docket No. C-4652; File No. 181 0005
Complaint, June 5, 2018 – Decision, June 5, 2018*

This consent order addresses the \$7.8 billion acquisition by Northrop Grumman Corporation of certain assets of Orbital ATK, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening the competition in the United States market for missile systems. The consent order requires Northrop to (1) continue to act as a non-discriminatory merchant supplier of Orbital ATK's solid rocket motors ("SRMs") rather than favor its now-vertically integrated missile system business, and (2) protect SRM and missile system competitors' competitively sensitive information from improper use or disclosure.

*Participants*For the *Commission*: James E. Southworth.For the *Respondents*: Thomas O. Barnett and Deborah A. Garza, Covington & Burling LLP; Joseph Krauss, Hogan Lovells US LLP.**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Northrop Grumman Corporation ("Northrop"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Orbital ATK, Inc. ("Orbital"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of

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the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Northrop Grumman Corporation, is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 2980 Fairview Park Drive, Falls Church, Virginia 22042.

2. Respondent Orbital ATK, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 45101 Warp Drive, Dulles, Virginia 20166.

3. Respondents, among other things, are engaged in the research, development, manufacture, and sale of missile systems. Respondent Orbital ATK is also engaged in the research, development, and manufacture of solid rocket motors (“SRMs”) for missile systems, as well as for commercial and scientific applications.

4. Each Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

5. Pursuant to an Agreement and Plan of Merger dated September 17, 2017, Northrop agreed to acquire 100 percent of the issued and outstanding voting securities of Orbital ATK for approximately \$7.8 billion (the “Acquisition”).

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6. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

7. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are (1) SRMs and (2) missile systems.

- a. SRMs provide the thrust to propel tactical, missile defense, and strategic missiles to their intended targets. SRMs are used for virtually all missile systems purchased by the United States Government because they offer numerous advantages over all other existing propulsion technologies.
- b. Missile systems provide essential national defense capabilities for the United States Government. The United States armed services use multiple types of missile systems, including short-range tactical missiles, longer-range strategic missiles, and missile defense systems to intercept enemy missiles, each of which has unique capabilities and is designed to perform specific mission(s).

8. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition is the United States. The missile systems that are the subject of this complaint are purchased by the United States Government, which also typically funds their development. Federal law, national security, and other considerations also usually dictate that missile system prime contractors procure the required SRMs from domestic suppliers.

IV. THE STRUCTURE OF THE MARKETS

9. The United States markets for SRMs and missile systems are highly concentrated. Orbital ATK is the world's largest producer of SRMs and is one of only two United States companies with the capability to develop and produce SRMs for most United States Government missile systems. Northrop is one

Complaint

of only a few companies capable of competing as a prime contractor in the highly concentrated missile system market. Northrop has demonstrated its technical, financial, and organizational ability to compete for complex United States Government missile systems by, among other things, being one of two suppliers awarded Technology Maturation and Risk Reduction phase contracts to develop preliminary designs for the Ground Based Strategic Deterrent program, the nation's next intercontinental ballistic missile system.

V. ENTRY CONDITIONS

10. New entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. There are significant barriers to entry into the development, manufacture, and sale of both SRMs and missile systems in the United States. It would be extremely difficult and costly for a new entrant to establish the technological expertise and specialized facilities necessary to compete successfully in either of these markets.

VI. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant market for missile systems in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Acquisition would provide Northrop with the ability and incentive to foreclose missile system prime contractor competitors by denying them access to Northrop's SRMs or by making pricing, personnel, schedule, investment, design, and other decisions that disadvantage those competitors. If Northrop were to withhold effective access to its SRMs, or increase the price of those SRMs, to its prime contractor competitors, competition would be lessened because the foreclosed prime contractors would be forced to raise the prices of their missile systems, decide not to compete, or invest less aggressively to win missile programs, which, in turn, would decrease competitive pressure on Northrop.

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12. If Northrop were to foreclose its missile system prime contractor competitors in any of these ways, the United States Government would be harmed because cost of missile systems may increase, innovation may be lessened, and/or quality would be reduced because the United States Government would be less likely to obtain the best possible combination of missile system prime contractor and SRM supplier.

VII. VIOLATIONS CHARGED

13. The Agreement described in Paragraph 5 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

14. The Acquisition described in Paragraph 5, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this fifth day of June, 2018, issues its Complaint against said Respondents.

By the Commission.

DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Northrop Grumman Corporation, (“Northrop”) of the voting securities of Respondent Orbital ATK, Inc., (“Orbital”), collectively “Respondents.” The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the

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Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Order” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepts the executed Consent Agreement and places it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order (“Order”):

1. Respondent Northrop Grumman Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 2980 Fairview Park Drive, Falls Church, Virginia 22042.
2. Respondent Orbital ATK, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 45101 Warp Drive, Dulles, Virginia 20166.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over

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Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED THAT, as used in this Order, the following definitions shall apply:

- A. “Northrop” means Northrop Grumman Corporation, its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Northrop Grumman Corporation, and the respective directors, officers, employees, agents, representatives, successors and assigns of each. After the Acquisition, Northrop will include Orbital.
- B. “Orbital” means Orbital ATK, Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Orbital ATK, Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each.
- C. “Respondent(s)” means Northrop and Orbital, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquisition” means Northrop’s acquisition of Orbital pursuant to the Agreement and Plan of Merger dated September 17, 2017, among Northrop and Orbital that was submitted by the Respondents to the Commission.
- F. “Acquisition Date” means the date on which the Acquisition is consummated.

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- G. “Collaborative Agreement” means any written agreement to collaborate on a proposal or other competitive efforts for the supply of SRMs and Related Services for a Missile Competition.
- H. “Compliance Officer” means the Person appointed pursuant to Paragraph V. of this Order, as well as his or her designees.
- I. “Compliance Program” means a program (including, but not limited to, an effective in-person or web-based training program) designed to ensure compliance with the requirements and prohibitions of this Order.
- J. “Discriminate” or “Discriminating” means to advantage Northrop relative to a Third Party Prime Contractor or to disadvantage a Third Party Prime Contractor relative to Northrop for any reason or in any way that is likely to or would limit, impair, hinder, delay, reduce or degrade, directly or indirectly, a Third Party Prime Contractor’s proposal or performance, where the Third Party Prime Contractor and Northrop are competitors with respect to a specific Missile Competition, in connection with: an Offer or the negotiations of an Offer by the Northrop SRM Business; providing SRM Information by the Northrop SRM Business; staffing, resource allocation, or design decisions in connection with SRM Products and Services offered by the Northrop SRM Business; entering into or negotiating Collaborative Agreements by the Northrop SRM Business; or making available technologies for SRMs and Related Services developed by the Northrop SRM Business, including Discriminating in price, schedule, quality, data, personnel, investment, technology, innovation, design, and risk; *provided, however*, that the determination of compliance or non-compliance with the non-discrimination provisions of this Order shall take into account that different Prime Contractors may choose to take different competitive approaches that may result in differences, individually and collectively, in

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the provision of SRMs and Related Services, including in terms of cost, schedule, design, performance, and the other parameters listed above, and that such differences do not reflect discrimination; and *provided further*, that nothing in this Order shall be interpreted to require Northrop to invest its own funds in support of a Third Party Prime Contractor (other than costs normally incurred by Northrop to prepare a proposal or otherwise respond to a Request for Information, Request for Proposal or similar request), and nothing in this Order shall be interpreted to preclude Northrop from charging a Third Party Prime Contractor a fee on the sale of SRMs and Related Services.

- K. “DoD” means the United States Department of Defense or any component thereof, *provided, however*, that where this Order requires that any information be provided to DoD, such information shall be provided to: (i) the Office of the Under Secretary of Defense for Acquisition and Sustainment, and (ii) the Office of the General Counsel of the Department of Defense.
- L. “Firewalled SRM Customer Team” means a specified group of Northrop Personnel that is dedicated to supporting a Prime Contractor (including Northrop where Northrop is a Prime Contractor) by providing SRMs and Related Services in pursuit of a particular Missile Competition.
- M. “Government Customer” means a United States government agency procuring Missiles or Missile Systems.
- N. “Management Oversight Group” means a specified group of Northrop Personnel selected from the Respondents’ corporate, sector or division (or their equivalents) leadership teams who require access to specified Third Party Non-Public Information in order to make enterprise decisions to fulfill their oversight and fiduciary responsibilities, including to ensure (i) that an Offer is consistent with Northrop’s financial

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guidelines and risk management constructs, accounting requirements, SEC disclosure and reporting obligations, and responsible management of a public company; and (ii) Northrop can effectively execute the Offer as expected, if it is accepted. The Management Oversight Group may also include specified Northrop Personnel who perform appropriate support functions, such as audit and legal functions. Specifically, the Management Oversight Group shall consist of Northrop Personnel in roles of the nature identified in Non-Public Appendix A who perform the oversight and fiduciary functions described above.

- O. “Missile(s)” means any air, sea, and/or land-based missile propelled by one or more SRM(s), including tactical missiles, missile defense interceptors, and strategic missiles; *provided, however*, Missile(s) does not include launch vehicles for satellites and other space systems.
- P. “Missile Competition” means a pending or future competition for one or more Missiles or Missile Systems to be procured by a Government Customer from the initiation of the DoD procurement and acquisition process through the award of the applicable full-rate production contract or, if a determination is made by the Government Customer not to award the applicable contract, through the time such a determination is made, including, but not limited to, any and all activities related to formulating, finalizing, and submitting proposals, whether or not accepted by the Government Customer and/or Prime Contractor, and negotiations with the Government Customer and/or Prime Contractor.
- Q. “Missile Information” means all information (such as, but not limited to, prime contract proposal cost or pricing, proposed designs, business pursuit strategies, and technical data) regarding a specific offer, or possible offer, for a Missile Competition that a Prime Contractor provides to, requests from, or otherwise

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exchanges with a supplier or potential supplier of SRMs to enable the SRM supplier to fully support the efforts of the Prime Contractor in connection with the research, development, manufacture, and delivery of Missiles and/or Missile Systems for the Missile Competition.

- R. “Missile System” means any system or series of systems comprised primarily of a Missile or Missiles, including all corresponding subsystems and ground systems components, software, and technical data procured with the Missile or Missiles.
- S. “Non-Public Information” means all confidential and proprietary non-public information (*i.e.*, information that is not generally known or otherwise publicly available), including, but not limited to, all intellectual property, know-how, designs, drawings, sketches, creative materials, specifications, models, samples, studies, analyses, analytical models, data, databases, records, simulations, tests, test results, assessments, evaluations, reports, documentation, computer programs, practices, processes, plans, estimates, proposals, and other technical, financial, economic, business strategy, or other documents, information, data, computer files (including files stored on a computer’s hard drive or other storage media), electronic files, books, records, papers, instruments, and all other materials and information, whether located, stored, or maintained in paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, and by whatever means, form, or format received or transmitted (*e.g.*, physically, orally, visually, by document, email, computer disks, magnetic tape, photograph, handwritten notes, draft, drawings, or any other type of media).
- T. “Non-Public Missile Information” means all Missile Information owned or licensed by a Third Party Prime Contractor that is furnished or otherwise submitted by

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the Third Party Prime Contractor to Respondents, is Non-Public Information, and has been, and continues to be, maintained in confidence by the Third Party Prime Contractor:

1. *Provided, however*, that (i) all written information must be designated by the Third Party Prime Contractor as proprietary information on the face thereof; and (ii) all oral, visual, or other non-written information must be identified as proprietary information by the Third Party Prime Contractor at the time of disclosure and confirmed in writing within 30 days of its disclosure;
 2. *Provided further* that Non-Public Missile Information shall not include information:
 - a. that becomes known or publicly available through no violation of this Order or any other existing agreement with Northrop intended to protect confidentiality;
 - b. that becomes known from a Third Party not known by Northrop to be in breach of a confidentiality or non-disclosure agreement with respect to such information;
 - c. independently known or developed by the recipient without reference to Non-Public Missile Information; or
 - d. after five years from the end of the period for disclosing information under the relevant Collaborative Agreement;
 3. In the event of a dispute, Missile Information shall be treated presumptively as Non-Public Information pending confirmation of its status.
- U. “Non-Public SRM Information” means all SRM Information owned or licensed by a Third Party SRM

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supplier that is furnished or otherwise submitted by the Third Party SRM supplier to Northrop, is Non-Public Information and has been, and continues to be, maintained in confidence by the Third Party SRM supplier:

1. *Provided, however*, that (i) all written information must be designated by the Third Party SRM supplier as proprietary information on the face thereof; and (ii) all oral, visual, or other non-written information must be identified as proprietary information at the time of disclosure and confirmed in writing within 30 days of its disclosure;
2. *Provided further* that Non-Public SRM Information shall not include information:
 - a. that becomes known or publicly available through no violation of this Order or any other existing agreement with Northrop intended to protect confidentiality;
 - b. that becomes known from a third party not known by Northrop to be in breach of a confidentiality or non-disclosure agreement with respect to such information;
 - c. independently known or developed by the recipient without reference to Non-Public SRM Information; or
 - d. after five years from the end of the period for disclosing information under the relevant Collaborative Agreement;
3. In the event of a dispute, SRM Information shall be treated presumptively as Non-Public Information pending confirmation of its status.

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- V. “Northrop Missile Business” means that portion of Northrop, or the Orbital entities acquired by Northrop, that is engaged in the research, development, manufacture, or sale of Missiles or Missile Systems as a Prime Contractor.
- W. “Northrop Personnel” means any directors, officers, employees, agents, representatives, consultants, or other Persons designated, hired, retained, or otherwise representing Respondents.
- X. “Northrop SRM Business” means the research, development, manufacture, or sale of SRMs as conducted by Orbital immediately prior to the Acquisition and as that Orbital business may subsequently be conducted by Northrop after the Acquisition.
- Y. “Offer” means and includes any proposal by Northrop, on specified terms and conditions, including specified pricing and costs, in response to a Request for Proposal, Request for Information, or other similar written request from a Prime Contractor to provide SRMs and Related Services for a Missile Competition.
- Z. “Person” means any individual, partnership, joint venture, firm, corporation, limited liability company or partnership, association, trust, unincorporated organization, or other business or government entity.
- AA. “Prime Contractor” means any Person engaged in the research, development, manufacture, sale and/or integration of Missiles or Missile Systems that sells or competes to sell Missiles or Missile Systems directly to a Government Customer.
- BB. “Remedial Costs” means those costs, incurred by Respondents, relating directly to the administration of measures to remedy conduct of Respondents in violation of this Order.

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- CC. “SRM” means any solid rocket motor used to propel a Missile.
- DD. “SRM Information” means all information (such as, but not limited to, technical data) that a Prime Contractor requests from, provides to, or otherwise exchanges with a supplier or potential supplier of SRMs to compete in a Missile Competition. SRM Information includes all related technical data and information that the Northrop SRM Business normally provides to a Prime Contractor prior to entering into, or in the course of working pursuant to, an Offer, a Collaborative Agreement, or otherwise supporting the Prime Contractor’s efforts in connection with a Missile Competition. Data and information provided include, but are not limited to, the types of data and information provided by the Northrop SRM Business to the Northrop Missile Business in connection with a Missile Competition.
- EE. “SRMs and Related Services” means one or more SRMs and services related to the research, development, manufacture, delivery, and support of the SRMs reasonably required to support a Prime Contractor’s proposal for a Missile Competition.
- FF. “TAS Group” means Technical and Administrative Support Group and refers to Northrop Personnel who may provide support services to more than one Firewalled SRM Customer Team on a particular Missile Competition. The TAS Group may include personnel providing engineering and technical support or general administrative and/or management support services.
- GG. “Third Party” means any Person other than Respondents.

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II.**IT IS FURTHER ORDERED THAT:**

- A. Respondents shall not Discriminate in any Missile Competition where Northrop: (i) is currently competing to be the Prime Contractor; or (ii) has the capability to compete and has taken the steps identified in Paragraph IV. and continues to take steps to compete as a Prime Contractor. By way of example, Respondents shall:
1. Not Discriminate in developing or providing an Offer requested by or made to a Third Party Prime Contractor, or in supporting the proposal of the Third Party Prime Contractor in connection with the Offer;
 2. Not Discriminate in providing SRM Information;
 3. Not Discriminate regarding staffing, resource allocation, or design decisions in connection with SRM Products and Services to be provided to any Third Party Prime Contractor;
 4. Not Discriminate in making any Offers to, or entering into Collaborative Agreements or other similar arrangements with, any Third Party Prime Contractor, or in the negotiation of such Offers, agreements, or other arrangements with Third Party Prime Contractors;

Provided, however, that no provision of this Order shall require Respondents to provide products, services or technologies, including SRMs and Related Services, to any Third Party without commercially reasonable terms or if it is commercially unreasonable because (i) the Northrop SRM Business does not have the technical capability to supply the Third Party Prime Contractor or (ii) the Northrop SRM

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Business does not have the capacity (and it is not commercially reasonable to expand its capacity) to provide SRMs or a Firewalled SRM Customer Team to one or more Prime Contractors that have requested such services or team because the number or burden of Prime Contractors seeking the benefit of Paragraph II.A. of this Order becomes unreasonably large, so long as Respondents are providing SRMs and Related Services to at least one Third Party Prime Contractor in the applicable Missile Competition;

5. Not Discriminate in making available for use in Missile Competitions any technologies for SRMs and Related Services developed by the Northrop SRM Business under independent research and development funding, government-funded research and development activities or other funds expended by the Northrop SRM Business; *provided, however*, that Respondents shall be under no obligation to disclose or offer the products or other results of any joint investment or development activity engaged in with one Prime Contractor (including Northrop) to any other Prime Contractor in the applicable Missile Competition;
6. Establish and maintain separate Firewalled SRM Customer Teams as required by Paragraph III. of this Order to support each Third Party Prime Contractor; and
7. As to each separate Firewalled SRM Customer Team, take all steps reasonably necessary to ensure that a Prime Contractor's Non-Public Missile Information is kept confidential and protected from unauthorized disclosure and use, including such steps as Respondents would take to protect their own Non-Public Information and as required pursuant to Paragraph III.

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- B. The provision of any protected information, technology, or product to the Respondents by any Third Party, or to any Third Party by the Respondents, pursuant to this Order shall be subject to appropriate customary confidentiality agreements on the treatment of competitively-sensitive, national security-sensitive, ITAR-controlled, and/or proprietary information. Notwithstanding any other provision of this Order, Respondents shall not be required to provide any information to any Persons, including at the DoD or a Third Party Prime Contractor, if they do not have the security clearance required to be eligible to receive such information.
- C. As to each Missile Competition, Respondents' obligations under the provisions of Paragraphs II.A.-B. of this Order shall cease to apply upon the occurrence of any of the following events: (i) the award of the applicable contract or, if a determination is made by the Government Customer not to award the applicable contract, the date such a determination is made; (ii) Respondent Northrop has been eliminated from consideration of being the Prime Contractor; (iii) Respondent Northrop has provided notice that it has withdrawn from consideration of being the Prime Contractor; (iv) Respondent Northrop's SRM Business has been eliminated from consideration of being the SRM supplier to all Third Party Prime Contractors (*provided*, that such obligations shall cease to apply with respect to a particular Third Party Prime Contractor's proposal if and when Northrop's SRM Business has been eliminated from consideration by that Prime Contractor); or (v) Respondent Northrop becomes the sole remaining Prime Contractor being considered in the Missile Competition, whichever occurs first.
- D. The purpose of the provisions of Paragraph II. of this Order is to assure that the Northrop SRM Business continues to provide its services to Third Party Prime Contractors in any Missile Competition after the

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Acquisition on a non-discriminatory basis and in the same manner and of the same performance level and quality as before the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED THAT Respondents shall protect a Third Party Prime Contractor's Non-Public Missile Information and Non-Public SRM Information in any Missile Competition where Northrop (i) is currently competing to be the Prime Contractor or (ii) has the capability to compete and has taken the steps identified in Paragraph IV. and continues to take steps to compete as a Prime Contractor. Specifically, Respondents shall take all actions as are reasonably necessary and appropriate to prevent access to, or the disclosure or use of, any Non-Public Missile Information or Non-Public SRM Information by or to any Person(s) not authorized to access, receive, or use such Non-Public Information pursuant to the terms of this Order, and shall develop and implement procedures and requirements to protect such Non-Public Information and to comply with the prohibitions and requirements of this Order, including, but not limited to, taking the following actions in any such Missile Competition covered by Paragraph II. of this Order to protect such Non-Public Information:

- A. Northrop Firewalled SRM Customer Teams shall maintain firewalls and confidentiality protections, consistent with company practices and industry standards, and in compliance with the following requirements and prohibitions:
 1. Northrop Personnel assigned to the Firewalled SRM Customer Teams shall receive training on the restrictions on the disclosure, use, and dissemination of Non-Public Information and, following completion of the relevant Missile Competition, will be reminded of their ongoing

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obligations with respect to such Non-Public Information;

2. Northrop Personnel assigned to the Firewalled SRM Customer Teams shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgement of their responsibilities regarding the restrictions on the use and dissemination of Non-Public Information;
3. Northrop shall keep separate and limit access to Non-Public Missile Information and Non-Public SRM Information of the respective Firewalled SRM Customer Teams, *e.g.*, by separating data in information systems; physically separating, securing, and/or shielding prototypes, models, and hard copies of such Non-Public Information; utilizing identification badge hangers to identify members of Firewalled SRM Customer Teams; and employing other processes designed to confine the flow of such Non-Public Information to personnel who have permission to see it in connection with the Missile Competition;
4. No member of a Firewalled SRM Customer Team supporting a Third Party Prime Contractor in a Missile Competition where Northrop is currently competing to be the Prime Contractor or has the capability to compete and has taken the steps identified in Paragraph IV. and continues to take steps to compete as a Prime Contractor (i) may participate in any way, directly or indirectly, in support of Respondents' efforts to participate as a Prime Contractor in the Missile Competition, including the preparation or review of a proposal or other response to a Request for Information, Request for Proposal or similar inquiry from the Government Customer or (ii) disclose any Non-Public Missile Information to any Northrop Personnel outside the Firewalled SRM Customer

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Team, except as permitted in Paragraph III.A.5. or Paragraph III.D. of this Order;

5. The Management Oversight Group shall not receive or be provided the Non-Public Missile Information of a Third Party Prime Contractor by members of a Firewalled SRM Customer Team, and members of a Firewalled SRM Customer Team shall not directly or indirectly disclose Non-Public Missile Information of a Third Party Prime Contractor to the Management Oversight Group, unless and solely to the extent necessary for the Management Oversight Group to perform the functions described in Paragraph I.N. of this Order and permitted under any applicable confidentiality agreement between Respondents and the Third Party Prime Contractor. In this regard, the Management Oversight Group:
 - a. Shall not be provided Non-Public Missile Information that does not relate directly to the Offer they are evaluating and does not relate directly to the provision of SRMs and Related Services;
 - b. May be informed of (i) the requirements of a Third Party Prime Contractor for SRMs and Related Services, including technical, interface and performance specifications, subcontract deliverables, evaluation criteria, schedule and terms; and (ii) the Firewalled SRM Customer Team's proposed approach to design, development and production, test, supply chain, cost and pricing, risks, schedule, quantity, terms and conditions; in each case, to enable the Management Oversight Group to evaluate and approve an Offer:
 - i. if and solely to the extent necessary for the Management Oversight Group to perform the functions described in Paragraph I.N. of

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this Order and permitted under any applicable confidentiality agreement between Respondents and the Third Party Prime Contractor;

- ii. only after Northrop's chief legal officer, or designee (who shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgement of their responsibilities regarding the restrictions on the use and dissemination of Non-Public Missile Information and Non-Public SRM Information) has reviewed any such Non-Public Information and verified that its disclosure to the Management Oversight Group is in compliance with this Order; and
- iii. where any such communication to the Management Oversight Group containing a Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information shall be made available for review by the Compliance Officer;
- c. Shall under no circumstances have access to Non-Public Missile Information of the Third Party Prime Contractor's overall bid price or bid strategy or to Non-Public Missile Information unrelated to the SRMs and Related Services; and
- d. To the extent a member of a Firewalled SRM Customer Team supporting a Third Party Prime Contractor in a Missile Competition is permitted to disclose and discloses Non-Public Missile Information to the Management Oversight Group, the Management Oversight Group shall not disclose such information to a different Firewalled SRM Customer Team and shall not use the information in any way,

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directly or indirectly, in support of Respondents' efforts to participate as a Prime Contractor in the Missile Competition; and

6. Northrop shall:
 - a. Not move members of a Firewalled SRM Customer Team from one Third Party Prime Contractor's team to any other Firewalled SRM Customer Team, for the same Missile Competition, so long as that Third Party Prime Contractor remains in the Missile Competition, without prior written consent of the affected Third Party Prime Contractor(s);
 - b. Maintain records of such transfers referenced in Paragraph III.A.6.a. during the term of this Order and make them available for inspection by the Commission and the Compliance Officer; and
 - c. Notify the Commission and the Compliance Officer of any such transfers within 15 days of the transfer;

Provided, however, that other than the limitations described in Paragraphs III.A.1-6. of this Order, the Order shall not limit the movement or reassignment of any Northrop Personnel to different roles or teams within the company.

- B. The Firewalled SRM Customer Teams shall protect all Non-Public Missile Information and Non-Public SRM Information, such that, absent a Third Party Prime Contractor's prior written consent or otherwise as provided below, the Firewalled SRM Customer Teams shall not:
 1. Disclose any of that Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information to Northrop

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Personnel in a Firewalled SRM Customer Team supporting Northrop or another Third Party Prime Contractor, or

2. Use that Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information for any purpose other than developing or providing an Offer requested by or made to that Third Party Prime Contractor, or in supporting the proposal of that Third Party Prime Contractor in connection with the Offer.
- C. The Northrop Missile Business shall take all reasonable steps to protect any Non-Public SRM Information, and shall not provide, disclose, or otherwise make any Non-Public SRM Information available to the Northrop SRM Business. Northrop shall use Non-Public SRM Information only in Northrop's capacity as a Prime Contractor absent the prior written consent of the proprietor of the Non-Public SRM Information.
- D. Notwithstanding the provisions of Paragraphs III.A.-C. of this Order:
1. A Firewalled SRM Customer Team on a particular Missile Competition may disclose the Non-Public Missile Information or Non-Public SRM Information of a Third Party Prime Contractor to specified Northrop Personnel providing (i) support services to Firewalled SRM Customer Teams as members of a TAS Group, or (ii) management functions as part of the Management Oversight Group, in each case, only to the extent those persons have a need to know such Non-Public Information to fulfill their responsibilities and in support of the proposals as described herein;
 2. Members of a TAS Group or Management Oversight Group who receive Non-Public Missile

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Information or Non-Public SRM Information from more than one Prime Contractor shall:

- a. not be members of any Firewalled SRM Customer Team;
 - b. use such Non-Public Information only as needed to perform their functions and not for any purpose other than related to developing or providing an Offer requested by or made to that Third Party Prime Contractor, or in supporting the proposal of that Third Party Prime Contractor in connection with the Offer;
 - c. protect the confidentiality of such Non-Public Information; and
 - d. not share such Non-Public Information of one Third Party Prime Contractor with any other competing Prime Contractor's Firewalled SRM Customer Team;
3. The Northrop Missile Business on a particular Missile Competition may disclose the Non-Public Missile Information or Non-Public SRM Information of a Third Party supplier of SRMs to specified Northrop Personnel providing (i) support services to the Northrop Missile Business as members of a TAS Group, or (ii) management functions as part of the Management Oversight Group, in each case, to the extent those persons have a need to know the Non-Public Information to fulfill their responsibilities and in support of the proposals as described herein;
 4. Members of a TAS Group or Management Oversight Group who receive Non-Public Missile Information or Non-Public SRM Information from any Third Party supplier of SRMs shall:

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- a. not be members of any Firewalled SRM Customer Team;
 - b. use such Non-Public Information only as needed to perform their functions and not for any purpose other than related to Northrop's potential purchase, directly or indirectly, of that Third Party's SRMs and Related Services for a Missile Competition;
 - c. protect the confidentiality of such Non-Public Information; and
 - d. not share such Non-Public Information of any Third Party supplier of SRMs with the Northrop SRM Business;
5. Members of a TAS Group or Management Oversight Group who receive Non-Public Missile Information or Non-Public SRM Information from a Third Party Prime Contractor or a Third Party supplier of SRMs shall receive training and shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgment of their responsibilities regarding the restrictions on the use and dissemination of such Third Party Non-Public Information, pursuant to the Compliance Program developed and provided to the Commission and the Compliance Officer.
- E. No later than 15 days after the Acquisition Date, Northrop shall submit a detailed plan for complying with the provisions of Paragraph III. of this Order with respect to all current Missile Competition(s) to the Commission and the Compliance Officer.
- F. The purpose of the provisions of Paragraph III. of this Order is to assure that the Northrop SRM Business maintains the confidentiality of all Non-Public Missile Information and the Northrop Missile Business maintains the confidentiality of all Non-Public SRM

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Information in a Missile Competition where Northrop is competing as a Prime Contractor, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED THAT within 10 days of the earliest date on which Northrop takes steps to compete or potentially compete as a Prime Contractor for a specific Missile Competition, including, but not limited to, setting up a capture or similar team to pursue the Missile Competition, committing funds to compete, responding to a Government Customer's Request for Information, Request for Proposal, or similar request for the Missile Competition, or other action by Northrop corporate management evidencing a decision to compete, Northrop shall notify the Commission and the Compliance Officer of this decision. The notice shall include the identity of the specific Missile Competition and a list of the members of the Management Oversight Group related to such Missile Competition.

V.**IT IS FURTHER ORDERED THAT:**

- A. The Under Secretary of Defense for Acquisition and Sustainment shall appoint a Compliance Officer, who shall be an employee of the United States government not otherwise involved in Missile Competitions or in setting the requirements for or the procurement of SRMs, Missiles or Missile Systems. The Compliance Officer shall have the power and authority to oversee compliance by the Respondents with the terms of this Order.
- B. To the extent reasonably necessary to perform his or her duties and responsibilities pursuant to this Order, and subject to any legally recognized privilege or other forms of protection of information, the Compliance

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Officer shall be authorized to and may, in the presence of counsel for Northrop:

1. during normal business hours, interview any of Respondents' personnel, upon three days' notice to that Respondent and without restraint or interference by Respondents, relating to any matters contained in this Order;
 2. during normal business hours, inspect and copy any document in the possession, custody, or control of Respondents relating to any matters contained in this Order;
 3. during normal business hours, obtain access to and inspect any systems or equipment, relating to any matters contained in this Order, to which Respondents' personnel have access;
 4. during normal business hours, obtain access to and inspect any physical facility, building, or other premises, relating to any matters contained in this Order, to which Respondents' personnel have access; and
 5. require Respondents to provide access to documents, data, and other information, relating to any matters contained in this Order, to the Compliance Officer in such form as the Compliance Officer may reasonably direct and within such time periods as the Compliance Officer may reasonably require.
- C. Respondents shall timely comply with the Compliance Officer's reasonable requests relating to Respondents' compliance with their obligations pursuant to this Order, and the Compliance Officer shall not unreasonably withhold approval of any request for additional time.

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- D. The Compliance Officer may:
1. investigate any complaint or representation made to the Compliance Officer, or made available to him or her with respect to any matter arising in relation to or connected with compliance by Respondents with this Order;
 2. solicit and accept comments from Third Parties regarding Respondents' compliance with this Order as the Compliance Officer deems necessary and appropriate;
 3. use other DoD employees as appropriate;
 4. retain, at the reasonable cost and expense of Northrop, such consultants, accountants, and other advisors (collectively, "Third Party Advisors") as are reasonably necessary to carry out the duties and responsibilities under this Paragraph V. of the Order, who shall be solely accountable to the Compliance Officer, and shall have the same access as the Compliance Officer pursuant to Paragraph V.B. of this Order; *provided, however,* that such Third Party Advisors shall maintain the confidentiality of all Non-Public Information and documents of (i) Respondents, subject to terms agreed with Northrop, or (ii) any other Person; and
 5. require Northrop, at its reasonable cost and expense and upon reasonable terms and conditions, to contract with such Third Party Advisors identified by the Compliance Officer for the provisions of such services of the Third Party Advisors to the Compliance Officer pursuant to this Order. In such contract, the DoD shall be named as a third party beneficiary under the terms of the contract, with the right of the Compliance Officer to direct the Third Party Advisors in performing the Compliance Officer's duties under this Paragraph V. of the Order; and the Third Party

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Advisors shall have the same access as the Compliance Officer pursuant to Paragraph V.B. of this Order; *provided, however*, Northrop may require the Third Party Advisors to sign a customary confidentiality agreement; *provided further, however*, that such agreement shall not restrict the Third Party Advisors from providing any information provided by Northrop under the contract to the Compliance Officer or the Commission.

The Compliance Officer (and any persons working with the Compliance Officer) shall not use or disclose any information obtained in the course of performing his or her duties under this Order other than for the purpose of overseeing compliance with this Order. The Compliance Officer (and any persons working with the Compliance Officer) shall fully protect any proprietary, source-selection sensitive or other Non-Public Information.

- E. The Compliance Officer shall consult with the Office of the General Counsel of the DoD to ensure that in performing the duties set forth in this Paragraph, the Compliance Officer does not interfere with the integrity of any DoD procurement.
- F. Respondents shall use their reasonable best efforts to assist the Compliance Officer in satisfaction of his or her responsibilities pursuant to this Order.
- G. Subject to Paragraphs V.B. and V.C. of this Order, Respondents shall cooperate with the Compliance Officer and shall take no action to interfere with or to impede the performance of the Compliance Officer in satisfaction of his or her responsibilities.
- H. Nothing in this Order shall alter or limit the rights or responsibilities of the parties under any contracts between DoD and one or more of the Respondents.

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VI.**IT IS FURTHER ORDERED THAT:**

- A. Respondents shall develop and implement written procedures and protocols and maintain a system of access and data controls, with the advice and assistance of the Compliance Officer, to comply with the requirements of this Order, which shall include, but not be limited to, procedures for:
1. Monitoring compliance;
 2. Requiring and enforcing compliance with appropriate remedial action in the event of non-compliance;
 3. Notifying the Compliance Officer and any Third Party Advisor of any non-compliance of the requirements of Paragraph III. of the Order.
- B. Respondents shall design, maintain, and operate a Compliance Program to assure compliance with the requirements and prohibitions of this Order, which shall include, but not be limited to:
1. Designating an officer or other individual to supervise personally the design, maintenance, and operation of the Compliance Program, and to be available on an ongoing basis to respond to any questions by employees of Respondents;
 2. Distributing a copy of the Order to all members of (i) a Firewalled SRM Customer Team; (ii) the TAS Group; (iii) the Management Oversight Group; or (iv) the Northrop Personnel who are developing a proposal or otherwise preparing for Northrop to compete as Prime Contractor in a Missile Competition:

Decision and Order

- a. Within thirty (30) days of the date this Order becomes final; and
 - b. Annually within thirty (30) days of the anniversary of the date this Order becomes final until the Order terminates;
3. Training on the requirements of this Order for all members of (i) a Firewalled SRM Customer Team; (ii) the TAS Group; (iii) the Management Oversight Group; or (iv) the Northrop Personnel who are developing a proposal or otherwise preparing for Northrop to compete as a Prime Contractor in a Missile Competition;
 4. The retention of documents and records sufficient to record Respondents' compliance with its obligations under this Paragraph VI. of this Order.
- C. Respondents shall bear all of their costs of monitoring, complying with, and enforcing this Order, excluding the salaries and benefits of United States government employees.
- D. Respondents shall not charge to the DoD, either directly or indirectly, any of Respondents' costs, referred to in Paragraph VI.C. of this Order, including any Remedial Costs; *provided, however*, that costs referred to in Paragraph VI.C. of this Order, incurred by Respondents, other than Remedial Costs, associated with normal business activities that could reasonably have been undertaken by Respondents in the absence of this Order are not subject to the restrictions of Paragraphs VI.C. and VI.D. of this Order, whether or not such activities are affected by this Order.

Decision and Order

VII.**IT IS FURTHER ORDERED THAT:**

- A. Respondent Northrop shall notify the Commission and its staff, the DoD, and the Compliance Officer of the Acquisition Date no later than five days after the Acquisition Date. Respondent Northrop shall notify the Commission via email to the Secretary of the Commission with electronic copies to the Secretary at ElectronicFilings@ftc.gov, and shall provide notice to staff of the Compliance Division via email to bccompliance@ftc.gov.
- B. Respondents shall submit verified written reports (“compliance reports”) in accordance with the following:
1. Respondents shall submit:
 - a. interim compliance reports 30 days after the Order is issued, and every 90 days thereafter until, for each Missile Competition existing at the time the Order is issued, (i) the award of the applicable contract or, if a determination is made by the Government Customer not to award the applicable contract, the date such a determination is made; (ii) Respondent Northrop has been eliminated from consideration of being the Prime Contractor; (iii) Respondent Northrop has provided notice that it has withdrawn from consideration of being the Prime Contractor; (iv) Respondent Northrop’s SRM Business has been eliminated from consideration of being the SRM supplier to all Third Party Prime Contractors; or (v) Respondent Northrop is the sole remaining Prime Contractor, whichever occurs first;
 - b. interim compliance reports 30 days after the event which gives rise to an obligation to notify

Decision and Order

pursuant to Paragraph IV. of this Order, and every 90 days thereafter until (i) the award of the applicable contract or, if a determination is made by the Government Customer not to award the applicable contract, the date such a determination is made; (ii) Respondent Northrop has been eliminated from consideration of being the Prime Contractor; (iii) Respondent Northrop has provided notice that it has withdrawn from consideration of being the Prime Contractor; (iv) Respondent Northrop's SRM Business has been eliminated from consideration of being the SRM supplier to all Third Party Prime Contractors; or (v) Respondent Northrop is the sole remaining Prime Contractor, whichever occurs first, *provided, however*, that if Respondents are filing reports under Paragraph VII.B.1.a. of this Order, then the reports under this provision may be included in such reports;

- c. annual compliance reports one year after the date this Order is issued, and annually for the term of the Order on the anniversary of that date; and
 - d. additional compliance reports as the Commission or its staff may request;
2. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order, including, as applicable:
- a. the name and status of all Missile Competitions where Northrop is a competitor (or, for potential future Missile Competitions, when Northrop has the capability to compete and has taken steps in anticipation of potentially competing pursuant to Paragraph IV.) to be the Prime Contractor;

Decision and Order

- b. the identity of all Third Party Prime Contractors seeking SRMs from Northrop for any such Missile Competition and the status of such request for each Third Party Prime Contractor; and
 - c. such other information as the Compliance Officer may request.
- C. Respondents shall verify each compliance report with a notarized signature or sworn statement of the Chief Executive Officer or other officer or employee specifically authorized to perform this function, or self-verified in the manner set forth in 28 U.S.C. § 1746. Respondents shall submit an original and 2 copies of each compliance report to the Commission as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the DoD and the Compliance Officer.
- D. The Compliance Officer and DoD shall keep all reports and other information received in connection with this Order confidential.

VIII.

IT IS FURTHER ORDERED THAT Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Northrop Grumman Corporation or Orbital ATK, Inc.;
- B. Any proposed acquisition, merger, or consolidation of Northrop Grumman Corporation or Orbital ATK, Inc. (other than the Acquisition); or

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- C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

IX.

IT IS FURTHER ORDERED THAT, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege or other form of protection of information, upon written request and at least five days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED THAT this Order shall terminate on June 5, 2038.

By the Commission.

Concurring Statement

**NON-PUBLIC APPENDIX A – MANAGEMENT
OVERSIGHT GROUP****[Redacted From the Public Record Version, But Incorporated
By Reference]****Statement of Bureau of Competition Deputy Director
Ian Conner**

Today, the Commission voted to accept a consent agreement imposing remedies in the matter of Northrop Grumman Corporation's (Northrop) acquisition of Orbital ATK, Inc. (Orbital ATK). Without this remedy, the merger would have given Northrop the incentive and ability to discriminate against competitors for United States Department of Defense (DOD) missile systems and potentially dampened Northrop's incentive to provide DOD with the most sophisticated systems at a competitive price. At the same time, DOD expects substantial benefits from the merger, including increased competition for future programs and lower costs. To understand such potential competitive effects and any potential benefits, Commission staff worked closely with the DOD in this matter.¹ Such cooperation between the DOD and the Commission and the Antitrust Division of the Department of Justice (the antitrust agencies) is the hallmark of the agencies' defense industry reviews.²

¹ See, e.g., Statement of Commissioner Kovacic, In the Matter of Lockheed Martin Corporation, The Boeing Company, and United Launch Alliance, L.L.C., FTC File No. 051 0165, Docket No. C-4188 (May 8, 2007) (citing William E. Kovacic, *Toward the Development of a Unified Trans-Atlantic Defense Procurement Market*, 2006 Fordham Comp. L. Inst. 179, 191–92 (B. Hawk ed. 2007)), available at <https://www.ftc.gov/sites/default/files/documents/cases/2007/05/0510165kovacicmajorasrosch.pdf> (hereinafter "Kovacic Statement").

² See Joint Statement of U.S. Dep't of Justice & Federal Trade Comm'n on Preserving Competition in the Defense Industry (April 12, 2016), available at https://www.ftc.gov/system/files/documents/public_statements/944493/160412

Concurring Statement

The remedy approved by the Commission is a carefully tailored behavioral remedy that seeks to preserve the benefits of the transaction for DOD, while counteracting the incentive of Northrop/Orbital to engage in a vertical foreclosure strategy that would undermine its competitors and harm competition for present and future missile system programs. Significantly, DOD will appoint a Compliance Officer to ensure that the parties implement the required programs to prevent potential harms.

The Bureau of Competition typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction.³ This settlement does not depart from that policy. The special characteristics of the defense industry play an important role in considering appropriate remedies in many transactions. For instance, the defense industry is characterized by a single buyer—DOD—whose procurement processes are often distinct from other industries. That is the case here. In addition, the DOD depends on sophisticated products, such as the solid rocket motors at issue in this case, that are part of complex systems subject to winner-take-all competition for programs that can last decades.

Transactions in the defense industry can also implicate national security concerns. As Commission Chairman Robert Pitofsky testified nearly twenty years ago, “The Commission is sensitive to considerations of national security and in particular that a merger will enable the Defense Department to achieve its national security objectives in a more effective manner. The

[doj-ftc-defense-statement.pdf](#) (“The Agencies rely on DoD’s expertise, often as the only purchaser, to evaluate the potential competitive impact of mergers, teaming agreements, and other joint business arrangements between firms in the defense industry.”).

³ See D. Bruce Hoffman, “Vertical Merger Enforcement at the FTC,” Credit Suisse 2018 Washington Perspectives Conference (January 10, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf (“First and foremost, it’s important to remember that the FTC prefers structural remedies to structural problems, even with vertical mergers.”); see also FTC Press Release, “FTC Seeks to Block Cytac Corp.’s Acquisition of Digene Corp.” (June 24, 2002), available at <https://www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytac-corps-acquisition-digene-corp>.

Concurring Statement

Commission strongly believes, however, that competition produces the best goods at the lowest prices and is also most conducive to innovation.”⁴

For these reasons, there is ample precedent for accepting appropriate behavioral remedies in the defense industry when they suffice to eliminate potential anticompetitive effects.⁵ The Commission’s order adapts the language and approach successfully used in the Commission’s most recent vertical defense merger consent⁶ and is consistent with prior consent decrees imposed by both of the antitrust agencies in defense mergers.⁷

As in other industries, the lengths of consent decrees vary to account for the characteristics of the market in which the consent is occurring and the characteristics of the consent decree itself.⁸ The Commission’s order will remain in place for a twenty-year term, an appropriate duration to protect competition in light of the long duration of the particular defense programs and the bidding processes at issue, the potential effects for future unidentified missile programs, and the high barriers to entry in this industry.

⁴ Mergers and Acquisitions in the Defense Industry: Hearing before the Subcommittee on Acquisition and Technology of the United States Senate Armed Services Committee (April 15, 1997) (statement of Robert Pitofsky, former Chairman, Federal Trade Comm’n), available at <https://www.ftc.gov/es/public-statements/1997/04/mergers-and-acquisitions-defense-industry>.

⁵ *See id.*; *In re Lockheed Martin Corp.*, Dkt. C-4188 (complaint filed Oct. 6, 2006); *United States v. Northrop Grumman*, No. 1:02CV02432 (D.D.C. Dec. 23, 2002).

⁶ *In re Lockheed Martin Corp.*, Dkt. C-4188 (complaint filed Oct. 6, 2006).

⁷ *In re Lockheed Martin Corp.*, Dkt. C-4188 (complaint filed Oct. 6, 2006); *see also United States v. Northrop Grumman*, No. 1:02CV02432 (D.D.C. Dec. 23, 2002); Kovacic Statement.

⁸ *See, e.g., In re Enbridge, Inc.*, Dkt. C-4604 (complaint filed Mar. 24, 2017); *In re PepsiCo, Inc.*, Dkt. C-4301 (complaint filed Feb. 26, 2010); *In re The Coca-Cola Co.*, Dkt. C-4305 (complaint filed Sept. 27, 2010); *In re Boeing/Rockwell*, Dkt. C-3723 (complaint filed Mar. 7, 1997).

Concurring Statement

As the Commission recognized two years ago: “Our mission, when reviewing defense industry mergers is to ensure that our military continues to receive the effective and innovative products at competitive prices over both the short- and long-term, thereby protecting both our troops and our nation’s taxpayers.”⁹ The remedy in this case does that by protecting competition and preserving procompetitive benefits for our nation’s critical missile systems for at least the next twenty years. Finally, the Commission retains jurisdiction in the event of a violation of its order and may modify the order to address such violations.

⁹ Joint Statement of the U.S. Dep’t of Justice & Federal Trade Comm’n on Preserving Competition in the Defense Industry (April 12, 2016), available at https://www.ftc.gov/system/files/documents/public_statements/944493/160412_doj-ftc-defense-statement.pdf.

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted an Agreement Containing Consent Order (“Consent Agreement”) designed to remedy the anticompetitive effects resulting from Northrop Grumman Corporation’s (“Northrop”) proposed acquisition of Orbital ATK, Inc. (“Orbital ATK”). Under the terms of the Consent Agreement, Northrop would be required to (1) continue to act as a non-discriminatory merchant supplier of Orbital ATK’s solid rocket motors (“SRMs”) rather than favor its now-vertically integrated missile system business, and (2) protect SRM and missile system competitors’ competitively sensitive information from improper use or disclosure.

The Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Given that the acquisition could impact a current ongoing missile system competition, the Commission issued the accompanying Decision and Order (“Order”) as final prior to seeking public comment, as provided in Section 2.34(c) of the Commission’s Rules. This will allow the Commission to enforce the Order if there are any violations of its provisions during the public comment period. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement or modify the accompanying Order.

Pursuant to an Agreement and Plan of Merger dated September 17, 2017, Northrop agreed to acquire 100 percent of the issued and outstanding voting securities of Orbital ATK for approximately \$7.8 billion (the “Acquisition”). The Commission’s Complaint alleges that the Acquisition is in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by

Analysis to Aid Public Comment

lessening the competition in the United States market for missile systems. The Acquisition would provide Northrop with the ability and incentive to withhold its SRMs from competing missile system prime contractors, or only offer its SRMs at disadvantageous terms, thereby raising rivals' costs or otherwise undermining their ability to compete on future missile system bids. The Consent Agreement will remedy the alleged violations by prohibiting Northrop from discriminating against competing missile prime customers in supplying SRMs.

II. The Parties

Northrop is a Delaware corporation with its principal place of business in Falls Church, Virginia. Northrop is a global aerospace and defense company that acts as a prime contractor or preferred supplier on many high-priority programs for the United States Department of Defense ("DOD") and other United States Government agencies. Northrop is one of only a few companies capable of acting as a prime contractor for tactical, missile defense, and strategic missile systems for DOD [the United States Government]. From 1997 to 2013, Northrop was the prime contractor responsible for maintaining, sustaining, and modernizing the Minuteman III strategic missile system. Northrop is currently competing to develop the nation's next intercontinental ballistic missile system, the Ground Based Strategic Deterrent. Northrop has also successfully competed for United States Government research and development contracts for tactical missiles and missile defense interceptors.

Orbital ATK is a Delaware corporation with its principal place of business in Dulles, Virginia. The company is a prime contractor and merchant supplier of space, defense, and aviation-related systems to customers around the world. Orbital ATK is the nation's leading producer of SRMs for both defense and commercial applications. For defense programs, Orbital ATK produces strategic-grade SRMs for the Trident II D-5 and Minuteman III and the Missile Defense Agency's Ground-based Midcourse Defense interceptor. In addition, Orbital ATK is a leading producer of SRMs for air-, sea- and land-based tactical missiles and missile defense interceptors. Orbital ATK supplies these SRMs to prime contractors for use in their missile systems.

Analysis to Aid Public Comment

III. The Products and Structure of the Markets

Northrop is one of only four companies capable of supplying missile systems to the United States Government. Missile systems provide essential national defense capabilities for the United States Government. The United States Armed Forces employ multiple types of missile systems, including short-range tactical missiles, longer-range strategic missiles, and missile defense interceptors designed to defeat ballistic missile threats. Each type of missile system purchased by DOD has unique capabilities and is designed specifically to perform its given mission(s).

Orbital ATK is one of only two viable suppliers of SRMs for U.S. Government missile systems and the dominant supplier of large SRMs used for long-range strategic missiles. SRMs are used to propel tactical, missile defense, and strategic missiles to their intended targets. SRMs are used for virtually all missile systems purchased by the United States Government because they offer numerous advantages over all other existing propulsion technologies.

The relevant geographic market in which to analyze the effects of the proposed transaction is the United States. The missile systems that are the subject of the Complaint are solely purchased by the United States Government, which also typically funds their development. National security considerations and other factors limit DOD's ability to procure its missile systems from foreign suppliers. Federal law, national security, and other considerations similarly drive missile system prime contractors to procure SRMs from domestic suppliers.

IV. Entry

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. There are significant barriers to entry into the development, manufacture, and sale of both SRMs and missile systems in the United States. The relevant products are high technology, defense-specific products that require specialized expertise and facilities to develop, test, and manufacture. It would be extremely

Analysis to Aid Public Comment

difficult and costly for a new entrant to establish the technological expertise and specialized facilities necessary to compete successfully in either of these markets.

V. Effects of the Acquisition

Following the Acquisition, Northrop, will be one of only two viable suppliers of SRMs for U.S. Government missile systems. The choice of SRM can have a significant impact on the final determination of a missile system prime competition because the propulsion system is a critical element of the overall missile design. SRMs comprise a large portion of the cost of the integrated missile and their performance affects the range, accuracy, and payload capacity of the missile. Absent the protections of the Consent Agreement, Northrop would have the ability to disadvantage competitors for future missile prime contracts by denying or limiting their access to Northrop's SRM products and technologies, which would lessen the ability of Northrop's missile system competitors to compete successfully for a given missile system prime contract. The Acquisition would also give Northrop access, through the former Orbital ATK SRM business, to the proprietary information that rival missile prime contractors must share with its SRM vendor. Similarly, the Acquisition creates a risk that the proprietary, competitively sensitive information of a rival SRM supplier supporting Northrop's missile system business could be transferred to Northrop's vertically integrated SRM business.

VI. The Consent Agreement

The Consent Agreement remedies the acquisition's likely anticompetitive effects by requiring, whenever Northrop competes for a missile system prime contract, that Northrop must make its SRM products and related services available on a non-discriminatory basis to all other third-party competing prime contractors that wish to purchase them. The non-discrimination prohibitions of the Consent Agreement are comprehensive and apply to any potential discriminatory conduct affecting price, schedule, quality, data, personnel, investment, technology, innovation, design, or risk.

Analysis to Aid Public Comment

The Consent Agreement requires Northrop to establish firewalls to ensure that Northrop does not transfer or use any proprietary information that it receives from competing missile prime contractors or SRM suppliers in a manner that harms competition. These firewall provisions require that Northrop maintain separate firewalled teams to support offers of SRMs to different third-party missile prime contractors and to maintain these firewalled teams separate from the team supporting Northrop's missile prime contractor activities. The firewall provisions also prohibit Northrop's missile business from sharing proprietary information it may receive from third-party SRM suppliers with Northrop's SRM business.

The Consent Agreement also provides that the DOD's Under Secretary of Defense for Acquisition and Sustainment shall appoint a compliance officer to oversee Northrop's compliance with the Order. The compliance officer will have all the necessary investigative powers to perform his or her duties, including the right to interview respondent's personnel, inspect respondent's facilities, and require respondents to provide documents, data, and other information. The compliance officer has the authority to retain third-party advisors, at the expense of Northrop, as appropriate to perform his or her duties. Access to these extensive resources will ensure that the compliance officer is fully capable of overseeing the implementation of, and compliance with, the Order.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

**AMNEAL HOLDINGS, LLC,
AMNEAL PHARMACEUTICALS LLC,
IMPAX LABORATORIES, INC.,
AND
IMPAX LABORATORIES, LLC**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

*Docket No. C-4650; File No. 181 0017
Complaint, April 27, 2018 – Decision, June 29, 2018*

This consent order addresses the \$1.45 billion acquisition by Amneal Holdings, LLC and Amneal Pharmaceuticals LLC of certain assets of Impax Laboratories, Inc. and Impax Laboratories, LLC. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening current competition in the markets for: (1) generic desipramine hydrochloride tablets; (2) generic ezetimibe and simvastatin IR tablets; and (3) generic felbamate tablets in the United States. The complaint also alleges that the acquisition would violate the aforementioned statutes by lessening future competition in the markets for: (1) generic aspirin and dipyridamole ER capsules; (2) generic azelastine nasal spray; (3) generic diclofenac sodium and misoprostol DR tablets; (4) generic erythromycin tablets; (5) generic fluocinonide-E cream; (6) generic methylphenidate hydrochloride ER tablets; and (7) generic olopatadine hydrochloride nasal spray in the United States. The consent order requires the parties to divest all of Impax's rights and assets related to 1) generic desipramine hydrochloride tablets; 2) generic felbamate tablets; 3) generic aspirin and dipyridamole extended release ("ER") capsules; 4) generic diclofenac sodium and misoprostol delayed release ("DR") tablets; 5) generic ezetimibe and simvastatin immediate release ("IR") tablets; 6) generic erythromycin tablets; and 7) generic methylphenidate hydrochloride ER tablets to ANI Pharmaceuticals, Inc. Under the consent order, the parties also are required to divest all of Impax's rights and assets related to generic azelastine nasal spray and generic olopatadine hydrochloride nasal spray to Perrigo Company plc, and to divest all of Impax's rights and assets related to generic fluocinonide-E cream to G&W Laboratories.

Participants

For the *Commission*: *Kenneth A. Libby, Vanessa Schlueter, David von Nirschl and Kari A. Wallace.*

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For the *Respondents: Patrick C. English and Amanda P. Reeves, Latham & Watkins LLP; William Diaz, McDermott Will & Emery LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Amneal Holdings, LLC, and Respondent Amneal Pharmaceuticals LLC (collectively, “Amneal”), corporations subject to the jurisdiction of the Commission, have agreed to acquire the equity interests of Respondent Impax Laboratories, Inc., and Respondent Impax Laboratories, LLC (collectively, “Impax”), corporations subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Amneal Holdings, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3rd Floor, Bridgewater, New Jersey 08807. Respondent Amneal Pharmaceuticals LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3rd Floor, Bridgewater, New Jersey 08807.

2. Respondent Impax Laboratories, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 30831 Huntwood Avenue, Hayward, California 94544. Respondent Impax Laboratories,

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LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 30831 Huntwood Avenue, Hayward, California 94544.

3. Each Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and engages in business that is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

THE PROPOSED ACQUISITION

4. Pursuant to a business combination agreement dated October 17, 2017, Respondent Amneal proposes to acquire the equity interests of Respondent Impax in a series of transactions valued at approximately \$1.45 billion (the “Acquisition”). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

THE RELEVANT MARKETS

5. The relevant lines of commerce in which to analyze the effects of the Acquisition are the development, license, manufacture, marketing, distribution, and sale of the following generic pharmaceutical products:

- a. desipramine hydrochloride tablets;
- b. ezetimibe and simvastatin immediate release (“IR”) tablets;
- c. felbamate tablets;
- d. aspirin and dipyridamole extended release (“ER”) capsules;
- e. azelastine nasal spray;
- f. diclofenac sodium and misoprostol delayed release (“DR”) tablets;

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- g. erythromycin tablets;
- h. fluocinonide-E cream;
- i. methylphenidate hydrochloride ER tablets; and
- j. olopatadine hydrochloride nasal spray.

6. The United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in the relevant lines of commerce.

THE STRUCTURE OF THE MARKETS

7. Desipramine hydrochloride is a tricyclic antidepressant. Only five companies currently sell generic desipramine hydrochloride tablets in the United States: Amneal, Impax, Heritage Pharmaceuticals, Inc. (“Heritage”), Sandoz, and Teva Pharmaceutical Industries Ltd. (“Teva”). Sales by Teva, Sandoz, and Amneal account for more than 95 percent of the market. Heritage accounts for the remaining 5 percent while Impax only launched its product in late 2017. The Acquisition would reduce the number of suppliers of generic desipramine hydrochloride tablets from five to four and eliminate the most recent entrant into the market.

8. Ezetimibe and simvastatin is used to improve cholesterol and lower triglycerides. Only four companies currently sell generic ezetimibe and simvastatin IR tablets in the United States: Amneal, Impax, Dr. Reddy’s Laboratories (“Dr. Reddy’s”), and Teva. Sales by Impax account for more than half the market, while Dr. Reddy’s and Teva share the remainder. Amneal entered the generic ezetimibe and simvastatin IR tablets market at the end of 2017. The Acquisition would reduce the number of suppliers from four to three and eliminate the most recent entrant.

9. Felbamate is an anticonvulsant used in the treatment of epilepsy. Only four companies currently sell generic felbamate tablets in the United States: Amneal, Impax, Alvogen, and Wallace Pharmaceuticals, Inc. (“Wallace”). The Acquisition

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would reduce the number of suppliers of generic felbamate from four to three.

10. Aspirin and dipyridamole is an antiplatelet therapy used to reduce the risk of stroke. Only Amneal currently sells generic aspirin and dipyridamole ER capsules in the United States. Impax is one of only a limited number of suppliers capable of entering the market for generic aspirin and dipyridamole ER capsules in the near future.

11. Azelastine nasal spray is used to treat seasonal allergies. Three companies currently sell generic azelastine nasal spray: Impax, partnered with Perrigo Company plc (“Perrigo”); Wallace; and Apotex Inc. (“Apotex”). Amneal is one of a limited number of suppliers capable of entering the market in the near future.

12. Diclofenac sodium and misoprostol is used to provide pain relief while minimizing gastrointestinal side effects. Four companies—Amneal, Teva, Sandoz, and Exela Pharma Sciences LLC (“Exela”)—have approved ANDAs to sell generic diclofenac sodium and misoprostol DR tablets in the United States. In addition, Greenstone LLC, a Pfizer subsidiary, sells an authorized generic version. Sandoz does not sell its product directly to customers and supplies only to a private labeler. The Exela product, marketed by both Eagle Pharmaceuticals, Inc. and Dash Pharmaceuticals LLC, has limited sales. Impax, partnered with Micro Labs Limited, is one of only a few suppliers capable of entering the market for generic diclofenac sodium and misoprostol DR tablets in the near future.

13. Erythromycin is an antibiotic which until recently had only one supplier, Arbor Pharmaceuticals, LLC, in the United States. Amneal’s ANDA to sell generic erythromycin tablets was approved in March of 2018, and it has launched the product. Impax is one of a limited number of suppliers capable of entering the market for generic erythromycin in the near future.

14. Fluocinonide-E cream is a corticosteroid used on the skin to reduce swelling, redness, itching, and allergic reactions. Only four companies currently sell generic fluocinonide-E cream in the United States: Impax, Alvogen, Sun Pharmaceutical Industries

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Ltd. (“Sun”), and Teva. Sun and Teva are the market leaders, while Impax and Alvogen are recent entrants into the market. Amneal is one of only a few suppliers capable of entering the market for generic fluocinonide-E cream in the near future.

15. Methylphenidate hydrochloride is a central nervous system stimulant used to treat attention-deficit disorder and attention-deficit/hyperactivity disorder. Only four companies currently sell generic methylphenidate hydrochloride ER tablets in the United States: Teva is the leading supplier with more than 80 percent share, while Mylan N.V. and Trigen each have less than 10 percent share. Amneal’s ANDA was approved in February of 2018, and it has since launched the product. Impax is one of a limited number of suppliers capable of entering the market for generic methylphenidate hydrochloride ER tablets in the near future.

16. Olopatadine hydrochloride nasal spray is used to treat seasonal allergies. Three companies currently sell generic olopatadine hydrochloride nasal spray in the United States: Impax, partnered with Perrigo; Sandoz; and Apotex. Amneal is one of only a few suppliers capable of entering the market for generic olopatadine hydrochloride nasal spray in the near future.

ENTRY CONDITIONS

17. Entry into the relevant markets described in Paragraphs 7-16 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would not take place in a timely manner because the combination of drug development times and FDA approval requirements would be lengthy. In addition, no other entry is likely to occur such that it would be timely and sufficient to deter or counteract the competitive harm likely to result from the Acquisition.

EFFECTS OF THE ACQUISITION

18. The effects of the Acquisition, if consummated, may be to substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the

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FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Amneal and Impax and reducing the number of independent significant competitors in the markets for (1) generic desipramine hydrochloride tablets; (2) generic ezetimibe and simvastatin IR tablets; and (3) generic felbamate tablets, thereby increasing the likelihood that: (a) Amneal would be able to unilaterally exercise market power in these markets; (b) the remaining competitors would engage in coordinated interaction between or among each other; and (c) customers would be forced to pay higher prices; and
- b. by eliminating future competition between Amneal and Impax in the markets for (1) generic aspirin and dipyridamole ER capsules; (2) generic azelastine nasal spray; (3) generic diclofenac sodium and misoprostol DR tablets; (4) generic erythromycin tablets; (5) generic fluocinonide-E cream; (6) generic methylphenidate hydrochloride ER tablets; and (7) generic olopatadine hydrochloride nasal spray, thereby (a) increasing the likelihood that the combined entity would forego or delay the launch of each product, and (b) increasing the likelihood that the combined entity would delay, eliminate, or otherwise reduce the substantial additional price competition that would have resulted from an additional supplier of each product.

VIOLATIONS CHARGED

19. The Acquisition described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

20. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the

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Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of April, 2018, issues its Complaint against said Respondents.

By the Commission.

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The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Amneal Holdings, LLC and Respondent Amneal Pharmaceuticals LLC (collectively “Amneal”) of the equity interests of Respondent Impax Laboratories, Inc. and Respondent Impax Laboratories, LLC (collectively “Impax”). The resulting combined entity is to be named Amneal Pharmaceuticals, Inc. Amneal, Impax, and Amneal Pharmaceuticals, Inc. are hereinafter collectively referred to as “Respondents.” The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Orders” or “Consent Agreement”), containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other

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provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and this Order to Maintain Assets; and

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Amneal Holdings, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3rd Floor, Bridgewater, New Jersey 08807. Respondent Amneal Pharmaceuticals LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3rd Floor, Bridgewater, New Jersey 08807.
2. Respondent Amneal Pharmaceuticals, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3rd Floor, Bridgewater, New Jersey 08807.
3. Respondent Impax Laboratories, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 30831 Huntwood Avenue, Hayward, California 94544. Respondent Impax Laboratories, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of

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the State of Delaware with its executive offices and principal place of business located at 30831 Huntwood Avenue, Hayward, California 94544.

4. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Amneal” means: Amneal Holdings, LLC; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Amneal Holdings, LLC (including, without limitation, Amneal Pharmaceuticals LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Amneal also means: Amneal Pharmaceuticals, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Amneal Pharmaceuticals, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Amneal will include Impax.
- B. “Impax” means: Impax Laboratories, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Impax Laboratories, Inc. (including, without limitation, Impax Laboratories, LLC), and the

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respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Commission” means the Federal Trade Commission.
- D. “Respondent(s)” means Amneal and Impax, individually and collectively.
- E. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and
 - 2. Final Decision and Order following its issuance and service by the Commission in this matter.
- F. “Divestiture Product Business(es)” means the Business of Respondent (as that Respondent is specified in the definition of each Divestiture Product) related to each of the Divestiture Products to the extent that such Business is owned, controlled, or managed by the Respondent and the assets related to such Business to the extent such assets are owned by, controlled by, managed by, or licensed to, the Respondent.
- G. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.
- H. “Transition Period” means, for each Divestiture Product that is marketed or sold in the United States before the Closing Date, the period beginning on the date this Order to Maintain Assets is issued and ending on the earlier of the following dates: (i) the date on which the Acquirer directs the Respondent(s) to cease the marketing, distribution, and sale of such Divestiture Product(s); (ii) the date on which the Acquirer commences the marketing, distribution, and sale of such Divestiture Product(s); or (iii) the date

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four (4) months after the Closing Date for such Divestiture Product(s).

- I. “Orders” means the Decision and Order and this Order to Maintain Assets.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final and effective:

- A. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Product Assets (other than in the manner prescribed in the Decision and Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the related Divestiture Product Businesses.
- B. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain the operations of the related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the full economic viability, marketability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; High

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Volume Accounts; end-use customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans, and promotional activities for such Divestiture Product Business;
2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by the Respondents, including, but not limited to, all research, Development, manufacturing, distribution, marketing, and sales expenditures;
3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Divestiture Product Assets to an Acquirer;
4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products that were marketed or sold by Respondents prior to the date the Respondents entered the agreement to effect the Acquisition (as such agreement is identified in the definition of Acquisition), at the related High Volume Accounts;

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5. making available for use by each of the respective Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such Divestiture Product Business; and
 6. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such Divestiture Product Business by Respondents as of the date the Consent Agreement was signed by Respondents.
- C. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain a work force that is (i) at least as large in size (as measured in full time equivalents) as, and (ii) comparable in training, and expertise to, what has been associated with the Divestiture Products for the relevant Divestiture Product's last fiscal year.
- D. Not later than one (1) day after the date this Order to Maintain Assets is issued by the Commission, for each Divestiture Product that has been marketed or sold prior to the Closing Date, Respondents shall provide to the Proposed Acquirer of that Divestiture Product, for each High Volume Account, a list by either SKU or NDC Number containing the current net price per SKU or NDC Number, *i.e.*, the final price per SKU or NDC Number, charged by the relevant Respondent (as that Respondent is identified in the definition of each Divestiture Product) net of all customer-level discounts, rebates, or promotions, for that Divestiture Product, as of five (5) business days or less prior to the date this Order to Maintain Assets is issued.
- E. Respondents shall:
1. for a period of twelve (12) months from the Closing Date, provide that Acquirer or its

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Manufacturing Designee with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer. Each of these periods is hereinafter referred to as the “Divestiture Product Core Employee Access Period(s);”

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to the relevant Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by that Respondent to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; *provided, however*, that the provision of such information may be conditioned upon the Acquirer’s or Proposed Acquirer’s written confirmation that it will (i) treat the information as confidential and, (ii) use the information solely in connection with considering whether to provide or providing to Divestiture Product Core Employees the opportunity to enter into employment contracts during a Divestiture Product Core Employee Access Period, and (iii) restrict access to the information to such of the Acquirer’s or Proposed Acquirer’s employees who need such access in connection with the specified and permitted use;
3. during the Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by that Acquirer or its Manufacturing Designee of the Divestiture Product Core Employees related to the Divestiture Products and

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Divestiture Product Assets acquired by that Acquirer, and remove any impediments within the control of Respondent that may deter these employees from accepting employment with that Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with a Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, a Respondent shall not make any counteroffer to such a Divestiture Product Core Employee who has received a written offer of employment from that Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit a Respondent from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

4. until the Closing Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture, and/or market the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Product(s) and to ensure successful execution of the pre-Acquisition plans for that Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Closing Date(s) for the divestiture of the assets related to the Divestiture Product has occurred, including regularly

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scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law); and

5. for a period of one (1) year from the Closing Date, not: (i) directly or indirectly solicit or otherwise attempt to induce any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to a Divestiture Product (“Divestiture Product Employee”) to terminate his or her employment relationship with the Acquirer or its Manufacturing Designee; or (ii) hire any Divestiture Product Employee;

provided, however, a Respondent may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with that Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that this Paragraph does not require nor shall be construed to require a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition;

provided further, however, that a Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts a Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from that Respondent.

- F. During the Transition Period, with respect to each Divestiture Product that is marketed or sold in the United States by the Respondents before the Closing Date for that Divestiture Product, Respondents, in

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consultation with the Acquirer, for the purposes of ensuring an orderly marketing and distribution transition, shall:

1. develop and implement a detailed transition plan to ensure that the commencement of the marketing, distribution, and sale of such Divestiture Products by the Acquirer is not delayed or impaired by the Respondents;
2. designate employees of Respondents knowledgeable about the marketing, distribution, and sale related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Business related to the Divestiture Products;
3. maintain and manage inventory levels of the Divestiture Products in consideration of the marketing and distribution transition to the Acquirer;
4. continue to market, distribute, and sell the Divestiture Products;
5. allow the Acquirer access at reasonable business hours to all Confidential Business Information related to the Divestiture Products and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products that contain such Confidential Business Information pending the completed delivery of such Confidential Business Information to the Acquirer;
6. to the extent known or available to the specified Respondent, provide the Acquirer with a list of the inventory levels (weeks of supply) in the

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possession of each customer (*i.e.*, healthcare provider, hospital, group purchasing organization, wholesaler, or distributor) by stock keeping unit or NDA Number on a regular basis and in a timely manner;

7. to the extent known by the specified Respondent, provide the Acquirer with anticipated reorder dates for each customer by stock keeping unit or NDC Number on a regular basis and in a timely manner; and
 8. establish projected time lines for accomplishing all tasks necessary to effect the marketing and distribution transition to the Acquirer in an efficient and timely manner.
- G. Pending divestiture of the Divestiture Product Assets, Respondents shall:
1. not use, directly or indirectly, any Confidential Business Information related to the Business of the Divestiture Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or
 - c. applicable Law;
 2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Assets, (ii) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information (*e.g.*, employees of the Respondents responsible for the Contract Manufacture or continued Development

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of a Divestiture Product on behalf of an Acquirer), (iii) the Commission, or (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable Law;

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing, sales or Development of the Divestiture Products to the employees associated with the Business related to those Retained Products that are the Therapeutic Equivalent of the Divestiture Products;
 4. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the research and Development of the Development Divestiture Products to any employees associated with the Business related to those Retained Products that are the Therapeutic Equivalent of the Divestiture Products *unless* authorized by the Acquirer of the particular Divestiture Product to do so; and
 5. institute procedures and requirements to ensure that the above-described employees:
 - a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 - b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.
- H. Not later than ten (10) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain Assets is issued by the Commission, each Respondent shall provide written notification of the restrictions on

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the use and disclosure of the Confidential Business Information related to the Divestiture Products by that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.

- I. Each Respondent shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Each Respondent shall provide a copy of the notification to the Acquirer. Each Respondent shall maintain complete records of all such notifications at that Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgment program. Each Respondent shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.
- J. Each Respondent shall monitor the implementation by its employees and other personnel of all applicable restrictions with respect to Confidential Business Information, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets.
- K. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses through their full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Divestiture Product Businesses; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Product Assets except for ordinary wear and tear.

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III.**IT IS FURTHER ORDERED** that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor (“Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.
- B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.
- C. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor each Respondent’s compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If a Monitor is appointed, each Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor each Respondent’s compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out

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the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and
3. The Monitor shall serve until the divestiture of all Divestiture Product Assets has been completed, and the transfer and delivery of the related Product Manufacturing Technology has been completed, in a manner that fully satisfies the requirements of this Order, and, with respect to each Divestiture Product that is a Contract Manufacture Product or an Aspirin/Dipyridamole Product, until the earliest of:
 - a. the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture that Divestiture Product and able to manufacture the final finished Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents;
 - b. the date the Acquirer of that Divestiture Product notifies the Commission and Respondent of its intention to abandon its efforts to manufacture such Divestiture Product; or
 - c. the date of written notification from staff of the Commission that the Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture such Divestiture Product;

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provided, however, that, with respect to each Divestiture Product, the Monitor's service shall not extend more than five (5) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

- E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Each Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.
- F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
- G. Each Respondent shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or

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expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

- H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by each Acquirer with respect to the performance of a Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders; *provided, however*, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.C. of the Decision and Order, and ninety (90) days thereafter, the Monitor shall report in writing to the Commission concerning progress by each Acquirer or the Acquirer's Manufacturing Designee toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.
- I. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

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- K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as the Monitor pursuant to the Decision and Order.
- N. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders.

- A. Respondents shall include in their reports, among other things that are required from time to time, a detailed description of its efforts to comply with the relevant paragraphs of the Orders, including: a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the relevant Respondent to the Acquirer, and (iii) the agreement(s) to Contract Manufacture; and a detailed description of the timing for the completion of such obligations.

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- B. Respondents shall verify each compliance report with a notarized signature or sworn statement of the Chief Executive Officer or other officer or employee specifically authorized to perform this function, or self-verified in the manner set forth in 28 U.S.C. § 1746. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

provided, however, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the reports of compliance required to be submitted by Respondents pursuant to the Decision and Order.

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Amneal Pharmaceuticals, Inc., Impax Laboratories, Inc., or Impax Laboratories, LLC;
- B. any proposed acquisition, merger, or consolidation of Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Amneal Pharmaceuticals, Inc., Impax Laboratories, Inc., or Impax Laboratories, LLC; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution

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of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any Respondent made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters address, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and
- B. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the later of:

- A. three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

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- B. the day after the divestiture of all of the Divestiture Product Assets, as required by and described in the Decision and Order, has been completed;
- C. the day after the Product Manufacturing Technology related to each Divestiture Product has been provided to the Acquirer in a manner consistent with the Technology Transfer Standards and the Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers, and other transitions related to the provision of the Product Manufacturing Technology are complete; or
- D. the day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Amneal Holdings, LLC and Respondent Amneal Pharmaceuticals LLC (“collectively Amneal”) of the equity interests of Respondent Impax Laboratories, Inc. and Respondent Impax Laboratories, LLC (collectively “Impax”). The resulting combined entity is to be named Amneal Pharmaceuticals, Inc. Amneal, Impax, and Amneal Pharmaceuticals, Inc. hereinafter are collectively referred to as “Respondents.” The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the

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Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Orders” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. Now, in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Amneal Holdings, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3rd Floor, Bridgewater, New Jersey 08807. Respondent Amneal Pharmaceuticals LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3rd Floor, Bridgewater, New Jersey 08807.

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2. Respondent Amneal Pharmaceuticals, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 400 Crossing Boulevard, 3rd Floor, Bridgewater, New Jersey 08807.
3. Respondent Impax Laboratories, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 30831 Huntwood Avenue, Hayward, California 94544. Respondent Impax Laboratories, LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 30831 Huntwood Avenue, Hayward, California 94544.
4. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

- A. "Amneal" means: Amneal Holdings, LLC; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Amneal Holdings, LLC (including, without limitation, Amneal Pharmaceuticals LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Amneal also means: Amneal Pharmaceuticals, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures,

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subsidiaries, divisions, groups, and affiliates, in each case controlled by Amneal Pharmaceuticals, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Amneal will include Impax.

- B. “Impax” means: Impax Laboratories, Inc.; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Impax Laboratories, Inc. (including, without limitation, Impax Laboratories, LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Respondent(s)” means Amneal and Impax, individually and collectively.
- E. “Acquirer(s)” means the following:
 - 1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final and effective; or
 - 2. a Person approved by the Commission to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- F. “Acquisition” means Respondent Amneal’s acquisition of Impax pursuant to the Acquisition Agreement.

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- G. “Acquisition Agreement” means the *Business Combination Agreement* by and among Impax Laboratories, Inc., Atlas Holdings, Inc., a wholly owned subsidiary of Impax Laboratories, Inc., K2 Merger Sub Corporation, a wholly owned subsidiary of Impax Laboratories, Inc., and Amneal Pharmaceuticals LLC, that was submitted by the Respondents to the Commission in this matter. The Acquisition Agreement is contained in Non-Public Appendix I.
- H. “Acquisition Date” means the earlier of the following dates: (i) the date on which Respondent Amneal acquires fifty percent (50%) or more of the voting securities of Impax; or (ii) the date on which Respondent Amneal acquires any ownership interest in the assets of Impax pursuant to the Acquisition Agreement.
- I. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term “Agency” includes, without limitation, the United States Food and Drug Administration (“FDA”).
- J. “Amneal Aspirin/Dipyridamole ER Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Amneal pursuant to the following Application: ANDA No. 206392, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered extended release capsules containing, as the active pharmaceutical ingredients, aspirin and dipyridamole, at the following strength: 25mg aspirin/200mg dipyridamole.
- K. “ANI Pharmaceuticals” means ANI Pharmaceuticals, Inc., a corporation organized, existing, and doing

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business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 210 Main Street West, Baudette, Minnesota 56623. ANI includes any subsidiaries of ANI Pharmaceuticals, Inc.

- L. “Application(s)” means all of the following: “New Drug Application” (“NDA”), “Abbreviated New Drug Application” (“ANDA”), “Supplemental New Drug Application” (“SNDA”), or “Marketing Authorization Application” (“MAA”), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 et seq., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto. “Application” also includes an “Investigational New Drug Application” (“IND”) filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto.
- M. “Aspirin/Dipyridamole ER Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the following Application: ANDA No. 206964, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered extended release capsules containing, as the active pharmaceutical ingredients, aspirin and dipyridamole, at the following strength: 25mg aspirin/200mg dipyridamole.
- N. “Aspirin/Dipyridamole ER Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Aspirin/Dipyridamole ER Products, to the extent legally transferable, including, without limitation, the

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Categorized Assets related to the Aspirin/Dipyridamole ER Products.

- O. “Azela**stine** Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax or its co-development partner, Perrigo, pursuant to the following Application: ANDA No. 202743, and any supplements, amendments, or revisions to this ANDA. These Products are nasally administered metered sprays containing, as the active pharmaceutical ingredient, azelastine, at the following strength: eq 0.1876mg/spray.
- P. “Azela**stine** Product Assets” means all rights, title, and interest in and to all assets related to the Business related to the Azelastine Products to the extent that such rights are owned, controlled, or held by Impax under and by virtue of the *Development, Manufacturing, and Commercialization Agreement* between Impax Laboratories, Inc., and Perrigo Israel Pharmaceuticals Ltd., dated July 27, 2010, as amended November 4, 2013, and June 19, 2014. This agreement was submitted to the Commission by Respondents and is contained in Non-Public Appendix II.B.
- Q. “Azela**stine**/Olopatadine Product Divestiture Agreements” means the following:
1. *Transfer Agreement* by and between Impax Laboratories, Inc. and Perrigo Pharma International Designated Activity Company, dated March 23, 2018; and
 2. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreement(s).

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The Azelastine/Olopatadine Product Divestiture Agreements are contained in Non-Public Appendix II.B. The Azelastine/Olopatadine Product Divestiture Agreements that have been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective are Remedial Agreements.

- R. "Business" means (i) the research, Development, and manufacture of a Product wherever located throughout the world, and (ii) the commercialization, distribution, marketing, importation, advertisement, and sale of a Product in the United States.
- S. "Categorized Assets" means the following assets and rights of the specified Respondent (as that Respondent is identified in the definition of the Divestiture Product), as such assets and rights are in existence as of the date the specified Respondent signs the Consent Agreement in this matter and to be maintained by the Respondents in accordance with the Order to Maintain Assets until the Closing Date for each Divestiture Product:
1. all rights to all of the Applications related to the specified Divestiture Product;
 2. all rights to all of the Clinical Trials related to the specified Divestiture Product;
 3. all Product Intellectual Property related to the specified Divestiture Product that is not Product Shared Intellectual Property;
 4. all Product Approvals related to the specified Divestiture Product;
 5. all Product Manufacturing Technology related to the specified Divestiture Product that is not Product Shared Intellectual Property;

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6. all Product Marketing Materials related to the specified Divestiture Product;
7. all Product Scientific and Regulatory Material related to the specified Divestiture Product;
8. all Website(s) related exclusively to the specified Divestiture Product;
9. the content related exclusively to the specified Divestiture Product that is displayed on any Website that is not dedicated exclusively to the specified Divestiture Product;
10. for each specified Divestiture Product that has been marketed or sold by the specified Respondent prior to the Closing Date, a list of all of the NDC Numbers related to the specified Divestiture Product, and rights, to the extent permitted by Law:
 - a. to require Respondents to discontinue the use of those NDC Numbers in the sale or marketing of the specified Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and *except* as may be required by applicable Law and *except* as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement;
 - b. to prohibit Respondents from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) *except* for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and *except* as may be required by applicable Law;
 - c. to seek to change any cross-referencing by a customer of those NDC Numbers with a

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Retained Product (including the right to receive notification from the Respondents of any such cross-referencing that is discovered by a Respondent);

- d. to seek cross-referencing from a customer of the specified Respondent's NDC Numbers related to such Divestiture Product with the Acquirer's NDC Numbers related to such Divestiture Product;
 - e. to approve the timing of Respondents' discontinued use of those NDC Numbers in the sale or marketing of such Divestiture Product *except* for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the Closing Date and *except* as may be required by applicable Law and *except* as is necessary to give effect to the transactions contemplated under any applicable Remedial Agreement; and
 - f. to approve any notification(s) from Respondents to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondents prior to such notification(s) being disseminated to the customer(s);
11. all Product Development Reports related to the specified Divestiture Product;
 12. at the option of the Acquirer of the specified Divestiture Product, all Product Contracts related to the specified Divestiture Product;
 13. all patient registries related to the specified Divestiture Product, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data, and identification information required to be maintained by the FDA to facilitate the

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investigation of adverse effects related to the specified Divestiture Product (including, without limitation, any Risk Evaluation Mitigation Strategy as defined by the FDA);

14. for each specified Divestiture Product that has been marketed or sold by a Respondent prior to the Closing Date:
 - a. a list of all customers for the specified Divestiture Product and a listing of the net sales (in either units or dollars) of the specified Divestiture Product to such customers during the one (1) year period immediately prior to the Closing Date, stated on either an annual, quarterly, or monthly basis, including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the specified Divestiture Product on behalf of the High Volume Account and his or her business contact information;
 - b. for each High Volume Account, a list by either SKU or NDC Number containing the following: (i) the net price per SKU or NDC Number as of the Closing Date, *i.e.*, the final price per SKU or NDC Number, charged by the specified Respondent net of all customer-level discounts, rebates, or promotions; (ii) the net price per SKU or NDC Number charged by the specified Respondent at the end of each quarter during the one (1) year immediately prior to the Closing Date; (iii) any supply outages by SKU or NDC Number during the one (1) year period immediately prior to the Closing Date the result of which caused the specified Respondent to make a financial payment to the customer or to incur a penalty

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for a failure to supply; and (iv) to the extent known by the specified Respondent, the status of the Divestiture Product on the customer's respective formulary (*i.e.*, primary, secondary, or backup);

- c. for each month for the one (1) year period immediately prior to the Closing Date, a list containing the following historical information for the specified Divestiture Product: wholesale acquisition cost; and
 - d. backorders by SKU or NDC Number as of the Closing Date;
15. for each specified Divestiture Product, a list of all suppliers that are listed as a qualified source of the active pharmaceutical ingredient on any Application of a Retained Product that is the Therapeutic Equivalent of that Divestiture Product, but only in those instances wherein a Respondent is (i) the holder of the Application for that Retained Product and (ii) the Application is not subject to an exclusive license to a Third Party;
16. a list of each specified Divestiture Product that has had any finished product batch or lot determined to be out-of-specification during the three (3) year period immediately preceding the Closing Date, and, for each such Divestiture Product: (i) a detailed description of the deficiencies or defects (*e.g.*, impurity content, incorrect levels of the active pharmaceutical ingredient, stability failure) with respect to any out-of-specification batch or lot; (ii) the corrective actions taken to remediate the cGMP deficiencies in the Divestiture Product; and (iii) to the extent known by the specified Respondent, the employees (whether current or former) responsible for taking such corrective actions;

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17. for each specified Divestiture Product:
- a. to the extent known or available to the specified Respondent, a list of the inventory levels (weeks of supply) in the possession of each customer (*i.e.*, healthcare provider, hospital, group purchasing organization, wholesaler, or distributor) as of the date prior to and closest to the Closing Date as is available; and
 - b. to the extent known by the specified Respondent, any pending reorder dates for a customer as of the Closing Date;
18. at the option of the Acquirer of the specified Divestiture Product and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process, and finished goods related to the specified Divestiture Product;
19. the quantity and delivery terms in all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date, to be provided to the Acquirer of the specified Divestiture Product not later than five (5) days after the Closing Date;
20. at the option of the Acquirer of the specified Divestiture Product, the right to fill any or all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date; and
21. all of a Respondent's books, records, and files directly related to the foregoing;
- provided, however*, that "Categorized Assets" shall not include: (i) documents relating to a Respondent's

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general business strategies or practices relating to the conduct of its Business of generic pharmaceutical Products, where such documents do not discuss with particularity the specified Divestiture Product; (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of the specified Divestiture Product by the Monitor or the Acquirer of the specified Divestiture Product; (iv) information that is exclusively related to the Retained Products; (v) any real estate and the buildings and other permanent structures located on such real estate; and (vi) all Product Shared Intellectual Property;

provided further, however, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Divestiture Product and to Retained Products or Businesses of the specified Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the specified Divestiture Product; or (ii) for which any Respondent has a legal obligation to retain the original copies, that Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer of the specified Divestiture Product, the Respondents shall provide that Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the Respondents provide the Acquirer with the above-described information without requiring a Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

- T. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.

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- U. “Clinical Trial(s)” means a controlled study in humans of the safety, efficacy, or bioequivalence of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.
- V. “Closing Date” means, as to each Divestiture Product, the date on which a Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.
- W. “Confidential Business Information” means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and that is directly related to the conduct of the Business related to a Divestiture Product(s). The term “Confidential Business Information” *excludes*, and Respondents are not required to submit the following information to an Acquirer:
1. information relating to a Respondent’s general business strategies or practices that does not discuss with particularity the Divestiture Products;
 2. information specifically excluded from the Divestiture Product Assets conveyed to the Acquirer of the related Divestiture Product(s);
 3. information that is contained in documents, records, or books of a Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Divestiture Products acquired by that Acquirer or that is exclusively related to Retained Product(s); and
 4. information that is protected by the attorney work product, attorney-client, joint defense, or other

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privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

- X. “Contract Manufacture” means the following:
1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer (including, without limitation, for the purposes of Clinical Trials and/or commercial sales);
 2. to manufacture, or to cause to be manufactured, a Product that is the Therapeutic Equivalent of, and in the identical dosage strength, formulation, and presentation as, a Contract Manufacture Product on behalf of an Acquirer; or
 3. to provide, or to cause to be provided, any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a Contract Manufacture Product on behalf of an Acquirer.
- Y. “Contract Manufacture Product(s)” means, individually and collectively:
1. Ezetimibe/Simvastatin Products;
 2. Erythromycin Products; and
 3. any ingredient, material, or component used in the manufacture of the foregoing Products including the active pharmaceutical ingredient(s), excipient(s), or packaging materials;

provided, however, that with the consent of the Acquirer of the specified Product, a Respondent may substitute a Therapeutic Equivalent form of such Product in performance of that Respondent’s agreement to Contract Manufacture.

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- Z. “Desipramine Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the following Application: ANDA No. 205153, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered tablets containing, as the active pharmaceutical ingredient, desipramine, at the following strengths: 10mg; 25mg; 50mg; 75mg; 100mg; and 150mg.
- AA. “Desipramine Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Desipramine Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Desipramine Products.
- BB. “Development” means all preclinical and clinical drug development activities, including test method development and stability testing; toxicology; formulation; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals); Product Approval and registration; and regulatory affairs related to the foregoing. “Develop” means to engage in Development.
- CC. “Diclofenac/Misoprostol Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax or its co-development partner, Micro Labs, pursuant to the following Application: ANDA No. 204355, and any supplements, amendments, or revisions to this ANDA. These Products are orally

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administered delayed-release tablets containing, as active pharmaceutical ingredients, diclofenac and misoprostol, at the following strengths: 50mg diclofenac/0.2mg misoprostol; and 75mg diclofenac/0.2mg misoprostol.

DD. “Diclofenac/Misoprostol Product Assets” means all rights, title, and interest in and to all assets related to the Business related to the Diclofenac/Misoprostol Products to the extent that such rights are owned, controlled, or held by Impax under and by virtue of the *License, Supply and Distribution Agreement*, by and between Micro Labs Limited and Corepharma LLC, dated June 22, 2012. This agreement was submitted to the Commission by Respondents and is contained in Non-Public Appendix II.A.

EE. “Direct Cost” means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. “Direct Cost” to the Acquirer for its use of any of a Respondent’s employees’ labor shall not exceed the average hourly wage rate for such employee;

provided, however, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, “Direct Cost” means such cost as is provided in such Remedial Agreement for that Divestiture Product.

FF. “Divestiture Product(s)” means the following, individually and collectively:

1. Aspirin/Dipyridamole ER Products;
2. Azelastine Products;
3. Desipramine Products;

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4. Diclofenac/Misoprostol Products;
5. Erythromycin Products;
6. Ezetimibe/Simvastatin Products;
7. Felbamate Products;
8. Fluocinonide Products;
9. Methylphenidate Products; and
10. Olopatadine Products.

GG. “Divestiture Product Assets” means the following, individually and collectively:

1. Aspirin/Dipyridamole ER Product Assets;
2. Azelastine Product Assets;
3. Desipramine Product Assets;
4. Diclofenac/Misoprostol Product Assets;
5. Erythromycin Product Assets;
6. Ezetimibe/Simvastatin Product Assets;
7. Felbamate Product Assets;
8. Fluocinonide Product Assets;
9. Methylphenidate Product Assets; and
10. Olopatadine Product Assets.

HH. “Divestiture Product Core Employee(s)” means the Product Research and Development Employees and the Product Manufacturing Employees related to each Divestiture Product.

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- II. “Divestiture Product License” means a perpetual, non-exclusive, fully paid-up, and royalty-free license(s) under a Remedial Agreement with rights to sublicense to all Product Shared Intellectual Property and all Product Manufacturing Technology related to general manufacturing know-how that was owned, licensed, held, or controlled by a Respondent:
1. to research and Develop the specified Divestiture Product(s) for marketing, distribution, or sale within the United States;
 2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the specified Divestiture Product(s) within the United States;
 3. to import or export the specified Divestiture Product(s) to or from the United States to the extent related to the marketing, distribution, or sale of the specified Divestiture Products in the United States; and
 4. to have the specified Divestiture Product(s) made anywhere in the world for distribution or sale within, or import into the United States;
- provided, however,* that for any Product Shared Intellectual Property or Product Manufacturing Technology that is the subject of a license from a Third Party entered into by a Respondent prior to the Acquisition, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to that Respondent.
- JJ. “Divestiture Product Releasee(s)” means the following Persons:
1. the Acquirer for the assets related to a particular Divestiture Product;

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2. any Person controlled by or under common control with that Acquirer; and
 3. any Manufacturing Designee(s), licensees, sublicensees, manufacturers, suppliers, distributors, and customers of that Acquirer, or of such Acquirer-affiliated entities.
- KK. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.
- LL. “Domain Name” means the domain name(s) (uniform resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration; *provided, however*, “Domain Name” shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.
- MM. “Drug Master File(s)” means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.
- NN. “Erythromycin Product(s)” means the Products manufactured or in Development owned or controlled by Impax (ANDA not filed as of the date of the Consent Agreement) that are being developed as oral tablets that contain, as the active pharmaceutical ingredient, erythromycin at the following strengths: 250mg and 500mg.
- OO. “Erythromycin Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Erythromycin Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Erythromycin Products.

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- PP. “Ezetimibe/Simvastatin Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the following Application: ANDA No. 201890, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered tablets containing, as the active pharmaceutical ingredients, ezetimibe and simvastatin, at the following strengths: 10mg ezetimibe/10mg simvastatin; 10mg ezetimibe/20mg simvastatin; 10mg ezetimibe/40mg simvastatin; and 10mg ezetimibe/80mg simvastatin.
- QQ. “Ezetimibe/Simvastatin Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Ezetimibe/Simvastatin Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Ezetimibe/Simvastatin Products.
- RR. “Felbamate Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the following Application: ANDA No. 202284, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered tablets containing, as the active pharmaceutical ingredient, felbamate, at the following strengths: 400mg; and 600mg.
- SS. “Felbamate Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Felbamate Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Felbamate Products.
- TT. “Fluocinonide Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the

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following Application: ANDA No. 074204, and any supplements, amendments, or revisions to this ANDA. These Products are topically administered emulsified creams containing, as the active pharmaceutical ingredient, fluocinonide, at the following strength: 0.05%.

- UU. “Fluocinonide Product Assets” means all rights, title, and interest in and to all assets related to the Business related to the Fluocinonide Products to the extent that such rights are owned, controlled, or held by Impax under and by virtue of the *Assignment and Assumption Agreement* between Actavis Pharma, Inc., Actavis Mid Atlantic LLC, and Impax Laboratories, Inc. dated August 3, 2016. This agreement was submitted to the Commission by Respondents and is contained in Non-Public Appendix II.B.
- VV. “Fluocinonide Product Divestiture Agreement(s)” means the following:
1. *Termination Agreement* by and between Impax Laboratories, Inc. and G&W Laboratories, Inc., dated [insert], 2018; and
 2. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreement(s), including without limitation, Appendix I, *Seller NDC Number Transition Services*.

The Fluocinonide Product Divestiture Agreements are contained in Non-Public Appendix II.C. The Fluocinonide Product Divestiture Agreements that have been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final and effective are Remedial Agreements.

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- WW. “G&W” means G&W Laboratories, a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey with its principal executive offices located at 111 Coolidge Street, South Plainfield, New Jersey 07080-3895. G&W includes any subsidiaries of G&W Laboratories.
- XX. “Government Entity” means any Federal, state, local, or non-U.S. government; any court, legislature, government agency, or government commission; or any judicial or regulatory authority of any government.
- YY. “Group A Product(s)” means the following Divestiture Products, individually and collectively:
1. Aspirin/Dipyridamole ER Products;
 2. Desipramine Products;
 3. Diclofenac/Misoprostol Products;
 4. Erythromycin Products;
 5. Ezetimibe/Simvastatin Products;
 6. Felbamate Products; and
 7. Methylphenidate Products.
- ZZ. “Group A Product Assets” means the following Divestiture Product Assets, individually and collectively:
1. Aspirin/Dipyridamole ER Product Assets;
 2. Desipramine Product Assets;
 3. Diclofenac/Misoprostol Product Assets;
 4. Erythromycin Product Assets;

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5. Ezetimibe/Simvastatin Product Assets;
6. Felbamate Product Assets; and
7. Methylphenidate Product Assets.

AAA. “Group A Product Divestiture Agreement(s)” means the following:

1. the *Asset Purchase Agreement* by and between ANI Pharmaceuticals, Inc. and Impax Laboratories, Inc. dated as of April 23, 2018;
2. the letter agreement from Amneal Pharmaceuticals LLC to ANI Pharmaceuticals, Inc. to provide consulting services through certain named employees of Respondents to ANI Pharmaceuticals, Inc. with respect to the Aspirin/Dipyridamole Products, to be executed on or before the Closing Date for the Group A Product Assets;
3. the *Supply Agreement* by and between ANI Pharmaceuticals, Inc. and Impax Laboratories, Inc. to be executed on or before the Closing Date for the Group A Product Assets (for the supply of the Contract Manufacture Products);
4. the letter agreement from Impax Laboratories, Inc. to ANI Pharmaceuticals, Inc. to be executed on or before the Closing Date for the Group A Product Assets (regarding the labeling of certain products);
5. the *Agreement for the Exchange of Drug Safety Information* between Amneal Pharmaceuticals LLC & ANI Pharmaceuticals, Inc. to be executed on or before the Closing Date for the Group A Product Assets;
6. the *Supply Agreement* by and between ANI Pharmaceuticals, Inc. and Amneal Pharmaceuticals

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LLC to be executed on or before the Closing Date for the Group A Product Assets (for supply of Amneal Aspirin/Dipyridamole ER Products);

7. the *Quality Agreement* by and between Amneal Pharmaceuticals LLC & ANI Pharmaceuticals, Inc. to be executed on or before the Closing Date for the Group A Product Assets; and
8. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreements.

The Group A Product Divestiture Agreements are contained in Non-Public Appendix II.A. The Group A Product Divestiture Agreements that have been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective are Remedial Agreements.

- BBB. "High Volume Account(s)" means any retailer, wholesaler, or distributor whose annual or projected annual purchase amounts, in units or in dollars, of a Divestiture Product in the United States from a Respondent, was or was forecasted (prior to the public announcement of the Acquisition and subsequent divestiture) to be among the top twenty (20) highest such purchase amounts of that Respondent's total sales of that Divestiture Product to U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (ii) the end of the last quarter that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (iv) for forecasts of purchases of the Divestiture Product, the quarter immediately following the Closing Date.

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- CCC. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- DDD. “Manufacturing Designee” means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.
- EEE. “Methylphenidate Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax pursuant to the following Application: ANDA No. 208607, and any supplements, amendments, or revisions to this ANDA. These Products are orally administered extended release tablets containing, as active pharmaceutical ingredients, methylphenidate, at the following strengths: 18mg; 27mg; 36mg; and 54mg.
- FFF. “Methylphenidate Product Assets” means all rights, title, and interest in and to all assets related to the Business of Impax related to each of the Methylphenidate Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Methylphenidate Products.
- GGG. “Micro Labs” means Micro Labs Limited a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India with its executive offices and principal place of business located at 27, Race Course Road, Bangalore-560001, India. Micro Labs includes any subsidiaries of Micro Labs Limited.
- HHH. “Monitor” means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.
- III. “NDC Number(s)” means the National Drug Code number, including both the labeler code assigned by

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the FDA and the additional numbers assigned by the labeler as a product code for a specific Product.

- JJJ. “Olopatadine Product(s)” means the following: the Products manufactured, in Development, marketed, sold, owned, or controlled by Impax or its co-development partner, Perrigo, pursuant to the following Application: ANDA No. 202853, and any supplements, amendments, or revisions to this ANDA. These Products are nasally administered metered sprays containing, as the active pharmaceutical ingredient, olopatadine, at the following strength: 0.665mg/spray.
- KKK. “Olopatadine Product Assets” means all rights, title, and interest in and to all assets related to the Business related to the Olopatadine Products to the extent that such rights are owned, controlled, or held by Impax under and by virtue of the *Development, Manufacturing, and Commercialization Agreement* between Impax Laboratories, Inc., and Perrigo Israel Pharmaceuticals Ltd., dated July 27, 2010, as amended November 4, 2013, and June 19, 2014. This agreement was submitted to the Commission by Respondents and is contained in Non-Public Appendix II.B.
- LLL. “Orders” means this Decision and Order and the related Order to Maintain Assets.
- MMM. “Order Date” means the date on which the final Decision and Order in this matter is issued by the Commission.
- NNN. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.
- OOO. “Patent(s)” means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications

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for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

- PPP. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups, or affiliates thereof.
- QQQ. “Perrigo” means Perrigo Company plc, a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Ireland with its executive offices and principal place of business located at Treasury Building, Lower Grand Canal Street, Dublin 2, Ireland. Perrigo includes Perrigo Israel Pharmaceuticals Ltd., a company incorporated under the laws of Israel, and any subsidiaries of Perrigo Company plc.
- RRR. “Product(s)” means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an Application.
- SSS. “Product Approval(s)” means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a Product within the United States, and includes, without limitation, all approvals, registrations, licenses, or

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authorizations granted in connection with any Application related to that Product.

TTT. “Product Contracts” means all contracts or agreements:

1. that make specific reference to the specified Divestiture Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the specified Divestiture Product from a Respondent *unless* such contract applies generally to a Respondent’s sales of Products to that Third Party;
2. pursuant to which a Respondent had or has as of the Closing Date the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s), or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) from any Third Party, for use in connection with the manufacture of the specified Divestiture Product;
3. relating to any Clinical Trials involving the specified Divestiture Product;
4. with universities or other research institutions for the use of the specified Divestiture Product in scientific research;
5. relating to the specific marketing of the specified Divestiture Product or educational matters relating solely to the specified Divestiture Product(s);
6. pursuant to which a Third Party manufactures or plans to manufacture the specified Divestiture Product as a finished dosage form Product on behalf of a Respondent;

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7. pursuant to which a Third Party provides or plans to provide any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of the specified Divestiture Product on behalf of a Respondent;
8. pursuant to which a Third Party provides the Product Manufacturing Technology related to the specified Divestiture Product to a Respondent;
9. pursuant to which a Third Party is licensed by a Respondent to use the Product Manufacturing Technology related to the specified Divestiture Product;
10. constituting confidentiality agreements involving the specified Divestiture Product;
11. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the specified Divestiture Product;
12. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture, or distribution of the specified Divestiture Product to a Respondent including, but not limited to, consultation arrangements; and/or
13. pursuant to which any Third Party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of the specified Divestiture Product or the Business related to such Divestiture Product;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), a Respondent shall, at the Acquirer's option, assign or otherwise make available to the Acquirer all such rights under the contract or agreement as are related to the specified Divestiture Product, but concurrently

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may retain similar rights for the purposes of the Retained Product(s).

UUU. “Product Copyrights” means rights to all original works of authorship of any kind directly related to a Divestiture Product and any registrations and applications for registrations thereof within the United States, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and all educational materials for the sales force; copyrights in all preclinical, clinical, and process development data and reports relating to the research and Development of that Product or of any materials used in the research, Development, manufacture, marketing, or sale of that Product, including all copyrights in raw data relating to Clinical Trials of that Product, all case report forms relating thereto, and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports, and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, that Product’s sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees of a Respondent who accept employment with an Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to that Product or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data

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contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA or any other Agency.

VVV. "Product Development Reports" means:

1. pharmacokinetic study reports related to the specified Divestiture Product;
2. bioavailability study reports (including Reference Listed Drug information) related to the specified Divestiture Product;
3. bioequivalence study reports (including Reference Listed Drug information) related to the specified Divestiture Product;
4. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from, or otherwise conducted with the FDA relating to the Application(s) related to the specified Divestiture Product;
5. annual and periodic reports related to the above-described Application(s), including any safety update reports;
6. FDA approved Product labeling related to the specified Divestiture Product;
7. currently used or planned product package inserts (including historical change of controls summaries) related to the specified Divestiture Product;
8. FDA approved patient circulars and information related to the specified Divestiture Product;

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9. adverse event reports, adverse experience information, and descriptions of material events and matters concerning safety or lack of efficacy related to the specified Divestiture Product;
10. summary of Product complaints from physicians or clinicians related to the specified Divestiture Product;
11. summary of Product complaints from customers related to the specified Divestiture Product;
12. Product recall reports filed with the FDA related to the specified Divestiture Product, and all reports, studies, and other documents related to such recalls;
13. investigation reports and other documents related to any out of specification results for any impurities or defects found in the specified Divestiture Product;
14. reports related to the specified Divestiture Product from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any product or process issues, including, without limitation, identification and sources of impurities or defects;
15. reports of vendors of the component(s), active pharmaceutical ingredient(s), excipient(s), packaging component(s), and detergent(s) used to produce the specified Divestiture Product that relate to the specifications, degradation, chemical interactions, testing, and historical trends of the production of the specified Divestiture Product;
16. analytical methods development records related to the specified Divestiture Product;

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17. manufacturing batch or lot records related to the specified Divestiture Product;
18. stability testing records related to the specified Divestiture Product;
19. change in control history related to the specified Divestiture Product; and
20. executed validation and qualification protocols and reports related to the specified Divestiture Product.

WWW. “Product Employee Information” means the following, for each Divestiture Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Divestiture Product Core Employee (including former employees who were employed by a Respondent within ninety (90) days of the execution date of any Remedial Agreement); and
2. with respect to each such employee, the following information:
 - a. direct contact information for the employee, including telephone number;
 - b. the date of hire and effective service date;
 - c. job title or position held;
 - d. a specific description of the employee’s responsibilities related to the relevant Divestiture Product; *provided, however*, in lieu of this description, a Respondent may provide the employee’s most recent performance appraisal;
 - e. the base salary or current wages;

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- f. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;
 - g. employment status (*i.e.*, active or on leave or disability; full-time or part-time);
 - h. all other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- XXX. "Product Intellectual Property" means all of the following intellectual property related to a Divestiture Product (other than Product Shared Intellectual Property) that is owned, licensed, held, or controlled by a Respondent as of the Closing Date:
 1. Patents;
 2. Product Copyrights;
 3. Product Trademarks, Product Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information; and
 4. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof, and to bring suit against a Third Party for the past, present, or future infringement, misappropriation, dilution, misuse, or other violation of any of the foregoing;

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provided, however, that “Product Intellectual Property” does not include the corporate names or corporate trade dress of “Amneal”, “Impax”, or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which Amneal or Impax can be identified or defined.

YYY. “Product Manufacturing Employees” means all salaried employees of a Respondent who have directly participated in any of the following: (i) defining the commercial manufacturing process, (ii) confirming that the manufacturing process is capable of reproducible commercial manufacturing, (iii) formulating the manufacturing process performance qualification protocol, (iv) controlling the manufacturing process to assure performance Product quality, (v) assuring that during routine manufacturing the process remains in a state of control, (vi) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality Products, (vii) managing the operation of the manufacturing process, or (viii) managing the technological transfer of the manufacturing process to a different facility, of the Product Manufacturing Technology of the specified Divestiture Product (irrespective of the portion of working time involved, *unless* such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

ZZZ. “Product Manufacturing Technology” means all of the following related to a Divestiture Product:

1. all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable, or otherwise) related to the manufacture of that Product, including, but not

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limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, labeling and all other information related to the manufacturing process, and supplier lists;

2. all ingredients, materials, or components used in the manufacture of that Product including the active pharmaceutical ingredient(s), bag(s), excipient(s), or packaging material(s); and
3. for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer's option, all such equipment used to manufacture that Product.

AAAA. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of the specified Divestiture Product in the United States as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, advertising and display materials, speaker lists, promotional and marketing materials, Website content,

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artwork for the production of packaging components, television masters, and other similar materials related to the specified Divestiture Product.

BBBB. “Product Research and Development Employees” means all salaried employees of a Respondent who have directly participated in the research, Development, regulatory approval process, or Clinical Trials of the specified Divestiture Product (irrespective of the portion of working time involved, *unless* such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

CCCC. “Product Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory, and Clinical Trial materials and information.

DDDD. “Product Shared Intellectual Property” means the following:

1. all of the following intellectual property related to a Divestiture Product that is owned, licensed, held, or controlled by a Respondent as of the Closing Date, as follows:
 - a. Patents that are related to a Divestiture Product that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not discontinued or withdrawn) NDA or ANDA as of the Acquisition Date; and
 - b. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in the United States to limit the use or disclosure thereof, that are related to a

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Divestiture Product and that a Respondent can demonstrate have been used, prior to the Acquisition Date, for any Retained Product that is the subject of an active (not discontinued or withdrawn) NDA or ANDA as of the Acquisition Date; and

2. in those instances in which (i) a Respondent is the holder of an ANDA or NDA for a Product that is the Therapeutic Equivalent of any Divestiture Product, (ii) the ANDA or NDA is not subject to an exclusive license to a Third Party, and (iii) the Product subject to such ANDA or NDA is a Retained Product, a full, complete, and unlimited Right of Reference or Use to the Drug Master File related to the ANDA or NDA for this Retained Product to reference or use in any Application related to that Divestiture Product.

EEEE. “Product Trade Dress” means the current trade dress of a Product, including but not limited to, Product packaging and the lettering of the Product trade name or brand name.

FFFF. “Product Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof), and all common law rights, and the goodwill symbolized thereby and associated therewith, for a Product.

GGGG. “Proposed Acquirer” means a Person proposed by a Respondent (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets or rights required to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed pursuant to this Order.

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HHHH. “Remedial Agreement(s)” means the following:

1. any agreement between a Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including, without limitation, any agreement to supply specified Products or components thereof, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;
2. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;
3. any agreement between a Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including, without limitation, any agreement by that Respondent to supply specified Products or components thereof, and that has been approved by

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the Commission to accomplish the requirements of this Order; and/or

4. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a Divestiture Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

III. “Retained Product(s)” means any Product(s) other than a Divestiture Product.

JJJ. “Right of Reference or Use” means the authority to rely upon, and otherwise use all of the following:

1. an investigation of the quality, safety, or efficacy of a Product (including any or all such investigations conducted *in vitro*, *in vivo*, or *in silico* and any and all Clinical Trials);
2. Product Development Reports; or
3. Product Scientific and Regulatory Material;

for the purpose of obtaining approval of an Application or to defend an Application, including the ability to make available the underlying raw data from the investigation, Product Development Reports, or Product Scientific and Regulatory Material for FDA audit, if necessary.

KKKK. “SKU” means stock keeping unit.

LLLL. “Supply Cost” means a cost not to exceed any of the following: (i) a Respondent’s average direct cost per SKU or NDC Number in United States dollars of manufacturing the specified Divestiture Product for the twelve (12) month period immediately preceding the Acquisition Date, or (ii) a Respondent’s lowest net

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price (*i.e.*, the final price per SKU or NDC Number charged by a Respondent net of all discounts, rebates, or promotions) of the relevant Divestiture Product to any of a Respondent's top 5 High Volume Accounts (as measured in units of the Divestiture Product purchased by those customers) for the relevant Divestiture Product for the twelve (12) month period immediately preceding the Acquisition Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit and any allocation or absorption of costs for excess or idle capacity; *provided, however*, that in each instance where: (i) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, "Supply Cost" means the cost as specified in such Remedial Agreement for that Divestiture Product, but only if the "Supply Cost" specified in such Remedial Agreement during the first twelve (12) month period of a Respondent supplying the Contract Manufacture Product does not exceed a Respondent's lowest net price (*i.e.*, the final price per SKU or NDC Number charged by a Respondent net of all discounts, rebates, or promotions) of the relevant Divestiture Product to any of a Respondent's top 5 High Volume Accounts (as measured in units of the Divestiture Product purchased by those customers) for the relevant Divestiture Product for the twelve (12) month period immediately preceding the Acquisition Date.

MMMM. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*:

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1. designating employees of a Respondent knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the Monitor (if one has been appointed), for the purpose of effecting such delivery;
2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Divestiture Product that are acceptable to the Acquirer;
3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee;
4. permitting employees of the Acquirer to visit the Respondent's facility from which the Divestiture Product will be transferred for the purposes of evaluating and learning the manufacturing process of such Divestiture Product and/or discussing the process with employees of Respondent involved in the manufacturing process (including, without limitation, use of equipment and components, manufacturing steps, time constraints for completion of steps, methods to ensure batch or lot consistency), pharmaceutical development, and validation of the manufacturing of the Divestiture Product at the Respondent's facility; and
5. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:

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- a. manufacture the specified Divestiture Product in the quality and quantities achieved by a Respondent, or the manufacturer and/or developer of such Divestiture Product;
- b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee to manufacture, distribute, market, and sell the specified Divestiture Product in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product; and
- c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Divestiture Product.

NNNN. “Therapeutic Equivalent” means a drug product that is classified by the FDA as being therapeutically equivalent to another drug product.

OOOO. “Third Party(ies)” means any non-governmental Person other than the following: a Respondent; or an Acquirer of particular assets or rights pursuant to this Order.

PPPP. “United States” means the United States of America, and its territories, districts, commonwealths and possessions.

QQQQ. “Website” means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by a Respondent; *provided, however*, “Website” shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by a Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that a Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Divestiture Products.

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II.**IT IS FURTHER ORDERED** that:

- A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Group A Product Assets and grant the Divestiture Product License related to the Group A Products, absolutely and in good faith, to ANI Pharmaceuticals pursuant to, and in accordance with, the Group A Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of ANI Pharmaceuticals or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Group A Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Group A Product Assets to ANI Pharmaceuticals prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that ANI Pharmaceuticals is not an acceptable purchaser of any of the Group A Product Assets, then Respondents shall immediately rescind the transaction with ANI Pharmaceuticals, in whole or in part, as directed by the Commission, and shall divest the Group A Product Assets within one hundred eighty (180) days after the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, that if Respondents have divested the Group A Product Assets to ANI Pharmaceuticals prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in

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which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Group A Product Assets to ANI Pharmaceuticals (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Azelastine Product Assets and the Olopatadine Product Assets (to the extent that such assets are not already owned, controlled or in the possession of Perrigo), absolutely and in good faith, to Perrigo pursuant to, and in accordance with, the Azelastine /Olopatadine Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Perrigo or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Azelastine Product Assets or the Olopatadine Product Assets is incorporated by reference into this Order and made a part hereof;

provided however, that if Respondents have divested the Azelastine Product Assets or the Olopatadine Product Assets to Perrigo prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Azelastine Product Assets or the Olopatadine Product Assets (whichever is relevant) to Perrigo (including, but not limited to, entering into additional agreements or arrangements) as the

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Commission may determine are necessary to satisfy the requirements of this Order.

- C. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Fluocinonide Product Assets (to the extent that such assets are not already owned, controlled or in the possession of G&W), absolutely and in good faith, to G&W pursuant to, and in accordance with, the Fluocinonide Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of G&W or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the G&W Product Assets is incorporated by reference into this Order and made a part hereof;

provided however, that if Respondents have divested the Fluocinonide Product Assets to G&W prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Fluocinonide Product Assets to G&W (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- D. Prior to the Closing Date for each respective Divestiture Product, Respondent shall provide the Acquirer with the opportunity to review all contracts or agreements that are Product Contracts related to the Divestiture Products being acquired by that Acquirer for the purposes of the Acquirer's determination whether to assume such contracts or agreements.

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- E. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Divestiture Product Assets to an Acquirer, and to permit the Acquirer to continue the Business of the Divestiture Product(s) being acquired by that Acquirer;
- provided, however,* Respondents may satisfy this requirement by certifying that the Acquirer for the Divestiture Product Assets has executed all such agreements directly with each of the relevant Third Parties.
- F. Respondents shall:
1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer;
 2. deliver all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer to that Acquirer:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
 3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide that Acquirer and the Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products

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acquired by that Acquirer that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any such Confidential Business Information related to the Business of the Divestiture Products other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or
 - c. applicable Law;
5. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Products, (ii) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information (*e.g.*, employees of a Respondent responsible for the Contract Manufacture or continued Development of a Divestiture Product on behalf of an Acquirer), (iii) the Commission, or (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable Law;
6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Divestiture Products to the marketing or sales employees associated with the Business related to those Retained Products that are the Therapeutic Equivalent of the Divestiture Products; and
7. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the research and

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Development of the Development Divestiture Products to any employees associated with the Business related to those Retained Products that are the Therapeutic Equivalent of the Divestiture Products or in Development to become the Therapeutic Equivalent of a Divestiture Product *unless* authorized by the Acquirer of the particular Divestiture Product to do so.

- G. Respondents shall provide, or cause to be provided, to the Acquirer in a manner consistent with the Technology Transfer Standards the following:
1. all Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Product(s) being acquired by that Acquirer; and
 2. all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to a Respondent related to the Divestiture Products being acquired by that Acquirer.

Respondents shall obtain any consents from Third Parties required to comply with this provision. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the Third Party the Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Products acquired by that Acquirer. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Product Manufacturing Technology to that Acquirer. Within five (5) days of

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the execution of each such release, Respondents shall provide a copy of the release to that Acquirer.

- H. Respondents shall employ a staff of sufficient size, training, and expertise as is necessary to complete all of the transfers of the Product Manufacturing Technology to each of the Acquirers in a timely manner and to ensure that the Acquirer has sufficient assistance from Respondents to validate the manufacture of the Contract Manufacture Products being acquired by that Acquirer in commercial quantities, and in a manner consistent with cGMP at a facility chosen by the Acquirer.
- I. Respondents shall:
1. upon reasonable written notice and request from the Acquirer to Respondents, Contract Manufacture and deliver, or cause to be manufactured and delivered, to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Supply Cost, for a period of time sufficient to allow the Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished dosage form drug product independently of Respondents, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in Application(s) of a Respondent from Persons other than Respondents;
 2. make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied by Respondents pursuant to a Remedial Agreement meet the relevant Agency-approved specifications;

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3. for the Contract Manufacture Product(s) to be marketed or sold in the United States, agree to indemnify, defend, and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to the Acquirer pursuant to a Remedial Agreement by that Respondent to meet cGMP. This obligation may be made contingent upon the Acquirer giving Respondents prompt written notice of such claim and cooperating fully in the defense of such claim;

provided, however, that the supplying Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with the supplying Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further, however*, that this obligation shall not require such Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by the supplying Respondent to the Acquirer in an agreement to Contract Manufacture;

4. give priority to supplying a Contract Manufacture Product to the Acquirer over manufacturing and supplying of Products for Respondents' own use or sale;
5. agree to hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Contract Manufacture Products to be delivered in a timely manner *unless* (i) Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by

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Respondents, and (ii) Respondents are able to cure the supply failure not later than thirty (30) days after the receipt of notice from the Acquirer of a supply failure;

6. during the term of any agreement to Contract Manufacture, upon written request of that Acquirer or the Monitor (if any has been appointed), make available to the Acquirer and the Monitor (if any has been appointed) all records that relate directly to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Closing Date;
7. for each Contract Manufacturer Product for which Respondents purchase the active pharmaceutical ingredient(s), components(s), or excipient(s) from a Third Party, provide that Acquirer with the actual price paid by Respondents for each active pharmaceutical ingredient(s), component(s), and excipient(s), respectively, used to manufacture that Contract Manufacture Product;
8. for each Contract Manufacturer Product for which Respondents are the source of the active pharmaceutical ingredient(s), component(s), or excipient(s), not charge the Acquirer any intracompany transfer profit for such active pharmaceutical ingredient(s), component(s) or excipient(s) in calculating the total price for the final finished Contract Manufacture Product to the Acquirer, but such charges shall only reflect Respondents' actual cost;
9. during the term of any agreement to Contract Manufacture, take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);
10. in the event Respondents become (i) unable to supply or produce a Contract Manufacture Product

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from the facility or facilities originally contemplated under a Remedial Agreement with an Acquirer and (ii) that Product is the subject of an ANDA: provide Product that is the Therapeutic Equivalent of such Contract Manufacture Product from the facility(ies) that Respondents use or have used to source their own supply of the Product that is the Therapeutic Equivalent of the Contract Manufacture Product, where such facility(ies) is still suitable for use for such manufacturing;

11. provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Monitor to monitor compliance with the obligations to Contract Manufacture;
12. not be entitled to terminate any agreement to Contract Manufacture due to an Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency Law;
13. shall notify the Commission at least ninety (90) days prior to terminating any agreement with an Acquirer to Contract Manufacture for any reason, and shall submit at the same time a copy of such notice to the Monitor; and
14. during the term of any agreement to Contract Manufacture, provide consultation with knowledgeable employees of Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all Product Approvals to manufacture the

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Contract Manufacture Products acquired by that Acquirer in the same quality achieved by, or on behalf of, a Respondent and in commercial quantities, and in a manner consistent with cGMP, independently of Respondents and sufficient to satisfy management of the Acquirer that its personnel (or the Manufacturing Designee's personnel) are adequately trained in the manufacture of the Contract Manufacture Products.

The foregoing requirements to Contract Manufacture shall remain in effect with respect to each Contract Manufacture Product until the earliest of: (i) the date the Acquirer (or the Manufacturing Designee(s) of that Acquirer) is approved by the FDA to manufacture such Contract Manufacture Product for sale in the United States and able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents; (ii) the date the Acquirer notifies the Commission and Respondents of their intention to abandon their efforts to manufacture the relevant Contract Manufacture Product; (iii) the date of written notification from staff of the Commission that the Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture the relevant Contract Manufacture Product; or (iv) five (5) years after the Closing Date.

- J. Respondents shall designate employees of Respondents knowledgeable about the marketing, distribution, warehousing, and sale (including administrative logistics of sales to the respective High Volume Accounts) related to each of the Divestiture Products to assist the Acquirer, in the transfer and integration of the Business related to the Divestiture Products into the Acquirer's business.
- K. Respondents shall require, as a condition of continued employment post-divestiture of the Divestiture Product

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Assets, that each employee that has had responsibilities related to the marketing or sales of the Divestiture Products within the one (1) year period prior to the Closing Date, and each employee that has responsibilities related to the marketing or sales of those Retained Products that are the Therapeutic Equivalent of the Divestiture Products, in each case who have or may have had access to Confidential Business Information, and the direct supervisor(s) of any such employee, sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of that information to all other employees, executives, or other personnel of the Respondents (other than as necessary to comply with the requirements of this Order).

- L. Not later than ten (10) days after the Closing Date, each Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Each Respondent shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Each Respondent shall provide a copy of the notification to the Acquirer. Each Respondent shall maintain complete records of all such notifications at that Respondent's registered office within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Each Respondent shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

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M. Respondents shall:

1. for a period of twelve (12) months after the Closing Date, provide that Acquirer or its Manufacturing Designee with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and Divestiture Product Assets acquired by that Acquirer. Each of these periods is hereinafter referred to as the “Divestiture Product Core Employee Access Period(s)”;
2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to the relevant Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by that Respondent to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; *provided, however*, that the provision of such information may be conditioned upon the Acquirer’s or Proposed Acquirer’s written confirmation that it will (i) treat the information as confidential and, (ii) use the information solely in connection with considering whether to provide, or providing to Divestiture Product Core Employees the opportunity to enter into employment contracts during a Divestiture Product Core Employee Access Period, and (iii) restrict access to the information to such of the Acquirer’s or Proposed Acquirer’s employees who need such access in connection with the specified and permitted use;

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3. during the Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by that Acquirer or its Manufacturing Designee of the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer, and remove any impediments within the control of a Respondent that may deter these employees from accepting employment with that Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with a Respondent that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, a Respondent shall not make any counteroffer to any Divestiture Product Core Employee who has received a written offer of employment from that Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit a Respondent from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

4. until the Closing Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture, and/or market the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Business related to the Divestiture Product(s) and to ensure successful execution of the pre-Acquisition plans for that Divestiture Product(s). Such incentives shall include a continuation of all

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employee compensation and benefits offered by a Respondent until the Closing Date(s) for the divestiture of the Divestiture Product Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that this Paragraph does not require nor shall be construed to require a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year after the Closing Date, not: (i) directly or indirectly solicit or otherwise attempt to induce any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to a Divestiture Product (“Divestiture Product Employee”) to terminate his or her employment relationship with the Acquirer or its Manufacturing Designee; or (ii) hire any Divestiture Product Employee;

provided, however, a Respondent may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with that Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that a Respondent may do the following: (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts a Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from that Respondent.

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- N. If the Acquirer of the Aspirin/Dipyridamole ER Product Assets has not obtained all of the relevant Product Approvals necessary to manufacture (in a manner consistent with cGMP), market, and sell the Aspirin/Dipyridamole ER Products in commercial quantities by July 1, 2019, then, at the request of that Acquirer, Respondents shall:
1. grant an immediate license to that Acquirer to enable that Acquirer to market and sell the Amneal Aspirin/Dipyridamole ER Products;
 2. supply the Amneal Aspirin/Dipyridamole ER Products to that Acquirer in commercial quantities in time to enable the Acquirer to commence the delivery of the Amneal Aspirin/Dipyridamole ER Products to customers by October 1, 2019;
 3. make representations and warranties to the Acquirer that the Amneal/Dipyridamole ER Products supplied by Respondents pursuant to a Remedial Agreement meet the relevant Agency-approved specifications;
 4. agree to hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Amneal Aspirin/Dipyridamole ER Products to be delivered in a timely manner *unless* (i) Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents, and (ii) Respondents are able to cure the supply failure not later than thirty (30) days after the receipt of notice from the Acquirer of a supply failure;
 5. give the firm purchase orders of the Acquirer for the Amneal Aspirin/Dipyridamole ER Products equal footing with the manufacture and supply of the Amneal Aspirin/Dipyridamole ER Products for Respondents' own use or sale; and

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6. not be entitled to terminate any agreement to supply the Amneal Aspirin/Dipyridamole ER Products to the Acquirer due to that Acquirer's filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency Law;

The above-described requirements for the Respondents to license and supply the Amneal Aspirin/Dipyridamole ER Products shall continue until the earliest of the following dates: (i) the date that Acquirer terminates the license and supply; (ii) the date one (1) month after that Acquirer receives all relevant Product Approvals necessary to manufacture (in a manner consistent with cGMP), market, and sell the Aspirin/Dipyridamole ER Products in commercial quantities; or (iii) March 1, 2021.

- O. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Product Manufacturing Technology related to a particular Divestiture Product to the Acquirer:
 1. Respondents shall take actions as are necessary to:
 - a. maintain the full economic viability and marketability of the Businesses associated with that Divestiture Product;
 - b. minimize any risk of loss of competitive potential for that Business;
 - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to that Divestiture Product;

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- d. ensure the assets related to each Divestiture Product are provided to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Business associated with each Divestiture Product;
 - e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and
2. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Product Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Businesses related to that Divestiture Product.
- P. Respondents shall not, in the United States:
1. use any of the Product Trademarks related to Divestiture Products or any mark confusingly similar to the Product Trademarks as a trademark, tradename, or service mark *except* as may be necessary to sell inventory of Divestiture Products in existence as of the Acquisition Date;
 2. attempt to register the Product Trademarks;
 3. attempt to register any mark confusingly similar to the Product Trademarks;
 4. challenge or interfere with an Acquirer's use and registration of the Product Trademarks acquired by that Acquirer; or
 5. challenge or interfere with an Acquirer's efforts to enforce its trademark registrations for and trademark rights in the relevant Product Trademarks against Third Parties.

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- Q. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against an Acquirer or the Divestiture Product Releasee(s) of that Acquirer:
1. under any Patent owned by or licensed to a Respondent as of the day after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof; or
 2. under any Patent that was filed or in existence on or before the Acquisition Date that is acquired by or licensed to a Respondent at any time after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;

if such suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale, or offer for sale within the United States of such Divestiture Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States. Respondents shall also covenant to that Acquirer that as a condition of any assignment or license from Respondents to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue that Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale, or

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offer for sale within the United States of such Divestiture Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States. The provisions of this Paragraph do not apply to any Patent owned by, acquired by, or licensed to or from a Respondent that claims inventions conceived by and reduced to practice after the Acquisition Date.

- R. Upon reasonable written notice and request from an Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to the Product Intellectual Property related to any of the Divestiture Product(s) acquired by that Acquirer, if such litigation would have the potential to interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale, or offer for sale within the United States of such Divestiture Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States.
- S. For any patent infringement suit filed prior to the Closing Date in which a Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that a Respondent has prepared or is preparing to defend against as of the Closing Date, and where such a suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Product(s) acquired by that Acquirer for the purposes of

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marketing, sale, or offer for sale within the United States of such Divestiture Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) acquired by that Acquirer, into, from, or within the United States, that Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that Divestiture Product;
 2. waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent that Acquirer in any ongoing patent litigation related to that Divestiture Product; and
 3. permit the transfer to that Acquirer of all of the litigation files and any related attorney work product in the possession of that Respondent's outside counsel related to that Divestiture Product.
- T. The purpose of the divestiture of the Divestiture Product Assets and the provision of the related Product Manufacturing Technology (for the Contract Manufacture Products) and the related obligations imposed on the Respondents by this Order is:
1. to ensure the continued use of such assets for the purposes of the Business associated with each Divestiture Product within the United States;
 2. to create a viable and effective competitor that is independent of Respondents in the Business of each Divestiture Product within the United States; and
 3. to remedy the lessening of competition resulting from the Acquisition as alleged in the

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Commission's Complaint in a timely and sufficient manner.

III.**IT IS FURTHER ORDERED** that:

- A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Remedial Agreements.
- B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.
- C. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor each Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.
- D. If a Monitor is appointed, each Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

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1. The Monitor shall have the power and authority to monitor each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission;
2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and
3. The Monitor shall serve until divestiture of all Divestiture Product Assets has been completed, and the transfer and delivery of the related Product Manufacturing Technology has been completed, in a manner that fully satisfies the requirements of this Order, and, with respect to each Divestiture Product that is Contract Manufacture Product or an Aspirin/Dipyridamole ER Product, until the earliest of:
 - a. the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture and sell that Divestiture Product and is able to manufacture the finished dosage form Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents;
 - b. the date the Acquirer of that Divestiture Product notifies the Commission and Respondents of its intention to abandon its efforts to manufacture that Divestiture Product; or

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- c. the date of written notification from staff of the Commission that the Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Divestiture Product;

provided, however, that the Monitor's service shall not extend more than five (5) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

- E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Each Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.
- F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
- G. Each Respondent shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's

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duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

- H. Respondents shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days after the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by a Respondent of its obligations under the Order; *provided, however*, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.C., and ninety (90) days thereafter, the Monitor shall report in writing to the Commission concerning progress by the Acquirer or the Acquirer's Manufacturing Designee toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.
- I. Each Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and

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assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

- K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- M. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IV.**IT IS FURTHER ORDERED** that:

- A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney

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General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by a Respondent to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

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2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by a Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) shall be made in the manner and to an Acquirer as required by

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this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the

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performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

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- F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

- A. to assure such Respondent's compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or
- B. to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or the assets and Businesses associated with those Divestiture Products;

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provided, however, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph V pursuant to an appropriate confidentiality order, agreement, or arrangement;

provided further, however, that pursuant to this Paragraph V, a Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VI.**IT IS FURTHER ORDERED** that:

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by a Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.
- D. For each Divestiture Product that is a Contract Manufacture Product, Respondents shall include in the Remedial Agreement(s) related to that Divestiture Product a representation from the Acquirer that the Acquirer shall use commercially reasonable efforts to secure the FDA approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product,

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as applicable, and to have any such manufacture to be independent of Respondents, all as soon as reasonably practicable.

- E. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.
- F. No Respondent shall modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

VII.**IT IS FURTHER ORDERED** that:

- A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition Date occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.
- B. Within five (5) days of each Closing Date, Respondents shall submit to Commission staff a letter certifying the date on which that particular divestiture occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to

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the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

- C. Within thirty (30) days after the Order Date, and every ninety (90) days thereafter until Respondents have (i) completed their obligations to Contract Manufacture the Contract Manufacture Products for an Acquirer, and (ii) fully provided the Product Manufacturing Technology related to the Divestiture Products to the Acquirer, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondents intend to comply, are complying, and have complied with these requirements of this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Orders, including:
1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional and/or consulting services being provided by Respondents to the Acquirer, and (iii) the agreement(s) to Contract Manufacture; and
 2. a detailed description of the timing for the completion of such obligations.
- D. One (1) year after the Order Date, annually for the next four (4) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order. In addition to the foregoing, Respondents shall include in these reports a list containing (i) all of the Retained Products that are the Therapeutic Equivalent of a Divestiture Product and (ii) total sales in units and dollars in the United States

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of each of these Retained Products by Respondents for either the one-year period immediately preceding the report or the full calendar or fiscal year that immediately precedes the report.

- E. Respondents shall verify each compliance report with a notarized signature or sworn statement of the Chief Executive Officer or other officer or employee specifically authorized to perform this function, or self-verified in the manner set forth in 28 U.S.C. § 1746. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Amneal Pharmaceuticals, Inc., Impax Laboratories, Inc., or Impax Laboratories LLC;
- B. any proposed acquisition, merger, or consolidation of Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Amneal Pharmaceuticals, Inc., Impax Laboratories, Inc., or Impax Laboratories LLC; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

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IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to a Respondent made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters address, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and
- B. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on June 29, 2028.

By the Commission.

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**NON-PUBLIC APPENDIX I
ACQUISITION AGREEMENT****[Cover Page]****[Redacted From the Public Record Version, But Incorporated
By Reference]****NON-PUBLIC APPENDIX II.A
AGREEMENTS RELATED TO THE
GROUP A PRODUCTS REMEDY****[Cover Page]****[Redacted From the Public Record Version, But Incorporated
By Reference]****NON-PUBLIC APPENDIX II.B.
AGREEMENTS RELATED TO THE
AZELASTINE PRODUCT AND OLOPATADINE
PRODUCT REMEDY****[Cover Page]****[Redacted From the Public Record Version, But Incorporated
By Reference]**

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**NON-PUBLIC APPENDIX II.C.
AGREEMENTS RELATED TO THE
FLUOCINONIDE PRODUCT REMEDY**

[Cover Page]

**[Redacted From the Public Record Version, But Incorporated
By Reference]**

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Amneal Holdings, LLC, Amneal Pharmaceuticals LLC (collectively, “Amneal”), Impax Laboratories, Inc., and Impax Laboratories, LLC (collectively, “Impax”) that is designed to remedy the anticompetitive effects resulting from Amneal’s acquisition of equity interests of Impax. Under the terms of the proposed Consent Agreement, the parties are required to divest all of Impax’s rights and assets related to the following seven products to ANI Pharmaceuticals, Inc. (“ANI”): generic desipramine hydrochloride tablets; generic felbamate tablets; generic aspirin and dipyridamole extended release (“ER”) capsules; generic diclofenac sodium and misoprostol delayed release (“DR”) tablets; generic ezetimibe and simvastatin immediate release (“IR”) tablets; generic erythromycin tablets; and generic methylphenidate hydrochloride ER tablets. Pursuant to the Consent Agreement, the parties also are required to divest all of Impax’s rights and assets related to generic azelastine nasal spray and generic olopatadine hydrochloride nasal spray to Perrigo Company plc (“Perrigo”), and to divest all of Impax’s rights and assets related to generic fluocinonide-E cream to G&W Laboratories (“G&W”).

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments from

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interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again evaluate the proposed Consent Agreement, along with the comments received, to make a final decision as to whether it should withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order (“Order”).

Pursuant to agreements dated October 17, 2017, Amneal proposes to acquire the equity interests of Impax in a series of transactions valued at approximately \$1.45 billion (the “Proposed Acquisition”). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening current competition in the following three U.S. markets: (1) generic desipramine hydrochloride tablets; (2) generic ezetimibe and simvastatin IR tablets; and (3) generic felbamate tablets. The Commission also alleges that the Proposed Acquisition would violate the aforementioned statutes by lessening future competition in the following seven U.S. markets: (1) generic aspirin and dipyridamole ER capsules; (2) generic azelastine nasal spray; (3) generic diclofenac sodium and misoprostol DR tablets; (4) generic erythromycin tablets; (5) generic fluocinonide-E cream; (6) generic methylphenidate hydrochloride ER tablets; and (7) generic olopatadine hydrochloride nasal spray. The proposed Consent Agreement will remedy the alleged violations by preserving the competition that otherwise would be eliminated by the Proposed Acquisition.

I. The Products and Structure of the Markets

In human pharmaceutical markets, price generally decreases as the number of generic competitors increases. Prices continue to decrease incrementally with the entry of the second, third, fourth, and even fifth generic oral pharmaceutical competitor. Accordingly, the reduction in the number of suppliers within each relevant market has a direct and substantial effect on pricing.

The Proposed Acquisition would reduce current competition in the markets for three products: (1) generic desipramine

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hydrochloride tablets; (2) generic ezetimibe and simvastatin IR tablets; and (3) generic felbamate tablets.

Desipramine hydrochloride, a tricyclic antidepressant, is sold by only three companies, other than Amneal and Impax, in the United States: Heritage Pharmaceuticals, Inc., Sandoz (a subsidiary of Novartis AG), and Teva Pharmaceutical Industries Ltd. (“Teva”).

Ezetimibe and simvastatin is used to improve cholesterol and lower triglycerides. Only four companies currently sell generic ezetimibe and simvastatin IR tablets in the United States: Amneal, Impax, Dr. Reddy’s Laboratories, and Teva.

Felbamate is an anticonvulsant used in the treatment of epilepsy. For generic felbamate tablets, Alvogen, and Wallace Pharmaceuticals, Inc. (“Wallace”) are the only two companies in addition to Amneal and Impax that sell the product in the United States.

The Proposed Acquisition also would reduce future competition in seven markets in which Amneal or Impax is a current competitor and the other is likely to enter the market: (1) generic aspirin and dipyridamole ER capsules; (2) generic azelastine nasal spray; (3) generic diclofenac sodium and misoprostol DR tablets; (4) generic erythromycin tablets; (5) generic fluocinonide-E cream; (6) generic methylphenidate hydrochloride ER tablets; and (7) generic olopatadine hydrochloride nasal spray.

Aspirin and dipyridamole is an antiplatelet therapy used to reduce the risk of stroke. Amneal is the only company currently selling generic aspirin and dipyridamole ER capsules in the United States, and Impax is one of only a limited number of suppliers capable of entering the market in the near future.

Azelastine nasal spray is used to treat seasonal allergies. Impax partners with Perrigo to sell generic azelastine nasal spray. In addition, Wallace and Apotex Inc. also sell the product. Amneal, one of a limited number of suppliers capable of entering the market for generic azelastine nasal spray in the near future,

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already has tentative approval from the United States Food and Drug Administration (“FDA”).

Diclofenac sodium and misoprostol is used to provide pain relief while minimizing gastrointestinal side effects. Four companies—Amneal, Teva, Sandoz, and Exela Pharma Sciences LLC (“Exela”)—have approved ANDAs to sell generic diclofenac sodium and misoprostol DR tablets in the United States. In addition, Greenstone LLC, a Pfizer subsidiary, sells an authorized generic version. Sandoz does not sell its product directly to customers and supplies only to a private labeler. The Exela product, marketed by both Eagle Pharmaceuticals, Inc. and Dash Pharmaceuticals LLC, has limited sales. Impax, partnered with Micro Labs Limited, is one of only a few suppliers capable of entering the market for generic diclofenac sodium and misoprostol DR tablets in the near future.

Erythromycin is an antibiotic that had only one supplier, Arbor Pharmaceuticals, LLC, before the FDA approved Amneal’s ANDA for generic erythromycin tablets in March of 2018. Amneal is the only supplier of generic erythromycin tablets in the United States. Impax is one of only a few suppliers capable of entering the market for generic erythromycin in the near future.

Fluocinonide-E cream, a topical corticosteroid used to reduce swelling, redness, itching, and allergic reactions, is sold in generic form by Impax, Alvogen, Sun Pharmaceutical Industries Ltd., and Teva in the United States. Amneal is one of very few suppliers capable of entering the market for generic fluocinonide-E cream in the near future.

Methylphenidate hydrochloride is a central nervous system stimulant used to treat attention-deficit disorder and attention-deficit/hyperactivity disorder. Only four companies currently sell generic methylphenidate hydrochloride ER tablets in the United States: Amneal, Mylan N.V., Teva, and Trigen Labs. Impax is one of only a limited number of suppliers capable of entering the market for generic methylphenidate hydrochloride ER tablets in the near future.

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Olopatadine hydrochloride nasal spray is used to treat seasonal allergies. Generic olopatadine hydrochloride nasal spray is sold in the United States by Sandoz, Apotex, and Impax partnered with Perrigo. Amneal is one of very few suppliers capable of entering the market in the near future.

II. Entry

Entry into the ten markets at issue would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. The combination of drug development times and regulatory requirements, including approval by the FDA, is costly and lengthy.

III. Competitive Effects

The Proposed Acquisition likely would cause significant anticompetitive harm to consumers by eliminating current competition between Amneal and Impax in the markets for generic desipramine hydrochloride tablets, generic ezetimibe and simvastatin IR tablets, and generic felbamate tablets. Generic desipramine hydrochloride tablets, generic ezetimibe and simvastatin IR tablets, and generic felbamate tablets are commodity products, and prices typically are inversely correlated with the number of competitors in each market. As the number of suppliers offering a therapeutically equivalent drug increases, the price for that drug generally decreases due to the direct competition between the existing suppliers and each additional supplier. Customers also raise concerns about their ability to source product at a competitive price if one supplier experiences manufacturing difficulties when there are fewer competitors in the market. The Proposed Acquisition would combine two of the only five companies selling generic desipramine hydrochloride tablets, and would combine two of the only four companies selling generic ezetimibe and simvastatin IR tablets and generic felbamate tablets, likely resulting in higher prices.

But for the proposed Consent Agreement, the Proposed Acquisition also is likely to delay the introduction of beneficial competition, and subsequent price decreases, by eliminating

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future competition in seven markets in which either Amneal or Impax is a current competitor and the other is likely to enter. Multiple customers expressed concerns about the effect of the proposed merger on the market for generic aspirin and dipyridamole ER capsules, in which Amneal is the only current generic competitor and Impax is approved to enter. Impax is one of only three competitors providing generic azelastine nasal spray, and the imminent entry of Amneal likely would allow customers to negotiate more competitive prices and secure adequate supply. Impax is one of very few well-positioned entrants in the market for generic diclofenac sodium and misoprostol DR tablets, in which Amneal is one of four current competitors, and customers note that they would benefit from additional entry to negotiate pricing. Amneal is the only generic erythromycin tablet competitor, and Impax is one of a limited number of companies with products in development that upon entry would allow customers to negotiate lower prices. Amneal is the only foreseeable entrant in the market for generic fluocinonide-E cream, in which Impax is one of only three competitors. In the market for generic methylphenidate hydrochloride ER tablets, Amneal is one of four current competitors and Impax is one of few potential entrants. Finally, Amneal is one of only a few entrants poised to enter the market for generic olopatadine hydrochloride nasal spray, in which Impax is one of only three current competitors. Absent a remedy, the Proposed Acquisition likely would cause U.S. consumers to pay higher prices for the aforementioned generic products.

IV. The Consent Agreement

As the Commission explained in its remedy review, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics* (hereafter "*The FTC Merger Remedies Study*")¹, products made at third-party manufacturing sites are easier to divest and involve less risk than the technology transfer from in-house manufacturing to a new facility, and thus

¹ See *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics* (Jan. 2017) at 36-37, https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-com-petition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

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help ensure the success of divestitures. As a result, in most cases, if one of the products is developed or manufactured by a third party, the Commission will require divestiture of that product.

Additionally, in mergers involving complex pharmaceutical products that are difficult to manufacture, the Commission generally will require the divestiture of an on-market product over a pipeline product to place the greater risk on the merging parties rather than the public, with exceptions for compelling and fact-specific reasons. When such compelling, fact-specific reasons exist, “The goal of a divestiture is to put the product development effort (including any pending regulatory filings) in the hands of a new firm with the same ability and incentive to bring the pipeline product to market.”²

The proposed Consent Agreement conforms to this approach and remedies the competitive concerns raised by the Proposed Acquisition in the generic azelastine nasal spray and generic olopatadine hydrochloride nasal spray markets by requiring Impax to return any rights and assets it has to its partner and ANDA-owner for these products, Perrigo. The proposed Consent Agreement remedies the competitive concerns raised by the Proposed Acquisition in the generic fluocinonide-E cream market by requiring Impax to return any rights and assets it has to its partner and ANDA-owner for this product, G&W. The parties must accomplish these divestitures no later than ten days after they consummate the Proposed Acquisition.

The proposed Consent Agreement remedies the competitive concerns raised by the Proposed Acquisition in seven of the markets at issue by requiring Impax to divest all of its rights and assets related to those products to ANI. ANI is a pharmaceutical corporation that develops, manufactures, sells, and distributes solid oral, liquid, and topical pharmaceutical products in the United States. ANI’s track record in developing and bringing to market pipeline products suggests that the divested products will be placed in the hands of a firm with the same ability and incentive to bring the products to market. As explained below, the Consent Agreement helps make that outcome more likely.

² See *The FTC’s Merger Remedies Study* at 31.

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For two of the products that both Amneal and Impax currently market, generic desipramine hydrochloride tablets and felbamate tablets, Impax will assign its contract manufacturing agreements to ANI. For the third currently-marketed product, Amneal will supply ANI with generic ezetimibe and simvastatin IR tablets for two years with the option to extend for two additional years.

In four overlap markets in which Amneal has an on-market product and Impax has a product in development, Impax will divest its rights and assets to ANI rather than requiring Amneal to divest its on-market, in-house manufactured products. Each of these product markets has specific facts that warrant the divestiture of the Impax rights and assets rather than the Amneal product. Of note, three products—generic aspirin and dipyridamole ER capsules, generic methylphenidate hydrochloride ER tablets, and generic diclofenac sodium and misoprostol DR tablets—are more complicated to manufacture because they have extended or delayed release characteristics.

For generic aspirin and dipyridamole ER capsules, Amneal is the only manufacturer with a product on the market. Amneal manufactures this product in-house. Impax received FDA approval for its ANDA in 2017 and had expected to use a third-party manufacturer to launch its product. That manufacturer experienced some manufacturing difficulties and Impax had begun the process of developing the means to produce the product at its own facilities. With the divestiture, ANI will finalize the manufacturing process and expects to have the Impax drug on the market soon. Nevertheless, should ANI be unable to market its own version of this product by October 1, 2019, ANI has the option to source generic aspirin and dipyridamole ER capsules from Amneal until ANI obtains the necessary regulatory approvals or through March 1, 2021, whichever date is earlier. This ensures that ANI will be able to market a competing product near the time Impax likely would have had the product on market, and provides the incentive for ANI to manufacture and market its own product. An alternative divestiture of the Amneal product would involve more risk and could jeopardize the only generic product on the market.

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The FDA approved Amneal's ANDA for generic methylphenidate hydrochloride ER tablets in February 2018. Impax also has an approved ANDA. Impax's product is contract manufactured, but the contract manufacturer needs to resolve manufacturing issues before it can resume manufacturing the product. It will be less risky for Impax to assign its manufacturing contract to ANI than to affect a technology transfer from Amneal for this complex product, and it will put the product in ANI's hands, which has the same ability and incentive as Impax to bring methylphenidate hydrochloride ER tablets to market. Thus, the proposed Order requires the divestiture of Impax's rights and assets to ANI.

For generic diclofenac sodium and misoprostol DR tablets, Amneal has an on-market in-house manufactured product, and Impax is partnered with Micro Labs to commercialize a competing product. Impax holds only marketing rights to the product; Micro Labs is responsible for development and manufacturing. Impax will transfer its marketing agreement with Micro Labs to ANI, and Micro Labs will manufacture the product for ANI for the current contract term.

For erythromycin tablets, Amneal launched its product in March 2018, and only one other competitor, Arbor Pharmaceuticals, is currently selling erythromycin tablets. Amneal manufactures the erythromycin tablets in-house. Impax is one of a few companies developing the product, and once approved, it plans to outsource the manufacturing. Here, the easier-to-divest product is the Impax drug in development. Thus, Commission staff considers it prudent to leave the in-house Amneal-manufactured product with the merged firm, an ongoing and viable competitor to Arbor. Further, Impax will transfer all of its assets related to its development of erythromycin tablets to ANI, which has the same ability and incentive to bring a competing third erythromycin tablet to market.

The proposed Order also requires Amneal to provide transitional services to ANI, Perrigo, and G&W to assist them in establishing their manufacturing capabilities and securing all of the necessary FDA approvals. These transitional services include technical assistance to manufacture the ten products at issue in

Analysis to Aid Public Comment

substantially the same manner and quality employed or achieved by Impax. It also includes advice and training from knowledgeable employees of the parties. Under the proposed Consent Agreement, the Commission also will appoint an Interim Monitor.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Proposed Acquisition. If the Commission determines that ANI, Perrigo, and/or G&W are not acceptable acquirers, or that the manner of the divestitures is not acceptable, the proposed Order requires the parties to unwind the sale of rights to ANI, Perrigo, and/or G&W and then divest the affected products to a Commission-approved acquirer within six months of the date the Order becomes final. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products as required.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Order or to modify its terms in any way.

INTERLOCUTORY, MODIFYING,
VACATING, AND MISCELLANEOUS
ORDERS

IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS
BOARD**

Docket No. 9374. Order, January 10, 2018

Order scheduling oral argument on Respondent's Motion to Dismiss Complaint and Complaint Counsel's Motion for Partial Summary Decision.

ORDER SCHEDULING CONSOLIDATED ORAL ARGUMENT AND
EXTENDING DEADLINES FOR COMMISSION RULINGS

On November 27, 2017, Respondent Louisiana Real Estate Appraisers Board filed a Motion to Dismiss Complaint in this proceeding. On that same date, Complaint Counsel submitted a Motion for Partial Summary Decision. Both motions raise issues regarding application of the state action doctrine. Respondent's Motion argues that re-promulgation of a regulation, establishment of new procedures, and various steps to address ongoing or prospective effects of prior regulation – all of which have occurred after issuance of the Commission's Complaint – bring Respondent's activities within the scope of the state action doctrine and render this proceeding moot. Complaint Counsel's Motion seeks summary determination that two of Respondent's defenses – asserting that “[t]he Complaint fails adequately to allege that the Board has a controlling number of active participants in the relevant **residential** appraisal market” (emphasis in original) and that “LREAB is immune from antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943)” – should be dismissed. Each party has since opposed the other's motion and has filed a timely Reply in support of its own motion.

Respondent has requested oral argument regarding its Motion to Dismiss, and we believe that entertaining oral argument on both motions would be beneficial. Although both parties should be prepared to address all issues raised by both motions, we

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instruct the parties to focus their attention during the oral argument on the following question:

Since the issuance of the Complaint, has the State of Louisiana taken sufficient steps to establish active supervision over the conduct of the Respondent at issue in this matter?

The Commission has determined to conduct the oral argument on Thursday, February 22, 2018, at 2:00 p.m. in Hearing Room 532 of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Each side will be allotted 30 minutes to present its argument. Respondent will have the opportunity to open the argument and will be permitted to reserve time for rebuttal. The Commission's deadlines for ruling upon the motions, currently 45 days after the respective Reply filings, will be adjusted to a date 45 days after the oral argument. Accordingly,

IT IS HEREBY ORDERED that the Commission will conduct oral argument regarding Respondent's Motion to Dismiss Complaint and Complaint Counsel's Motion for Partial Summary Decision on February 22, 2018, as specified above; and

IT IS FURTHER ORDERED that the Commission's deadlines for ruling on Respondent's Motion to Dismiss Complaint and Complaint Counsel's Motion for Partial Summary Decision are extended to April 9, 2018.

By the Commission.

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IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS
BOARD**

Docket No. 9374. Order, January 12, 2018

Order denying Respondent's motion to stay proceeding.

**ORDER DENYING RESPONDENT'S EXPEDITED MOTION TO STAY
PART 3 ADMINISTRATIVE PROCEEDING AND MOVE THE
EVIDENTIARY HEARING DATE**

On January 10, 2018, the Commission issued an order scheduling oral argument on two pending motions in this proceeding – a Motion to Dismiss Complaint, filed by Respondent Louisiana Real Estate Appraisers Board, and a Motion for Partial Summary Decision, filed by Complaint Counsel (“the pending motions”). The Commission’s order scheduled oral argument on February 22, 2018, and moved the deadlines for the Commission’s rulings on the pending motions to April 9, 2018.

One day later, Respondent moved (1) to stay the administrative proceeding until the Commission renders its decisions on the pending motions and (2) to delay the start of the evidentiary hearing from May 30, 2018, to August 27, 2018. Respondent argues that granting its motion would avoid expenses of pretrial activity, including discovery and the preparation of expert reports, that might prove unnecessary, depending on how the Commission resolves the pending motions. Respondent further asserts that the delay it seeks would not prejudice the public interest. In opposing Respondent’s motion, Complaint Counsel argues that Commission rules contemplate proceeding with discovery and other pretrial activities without delay and that Respondent has identified no unusual circumstances that would warrant a stay.

Commission Rule of Practice 3.22(b), 16 C.F.R. § 3.22(b) states in relevant part: “A motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders” When the

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Commission first adopted this Rule, it explained that the provision's "purpose . . . was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions" 16 C.F.R. Parts 3 and 4: Rules of Practice, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2009).¹ The Commission, nonetheless, left itself discretion to order a stay in appropriate cases.

The Commission has determined that a stay of the proceedings pending before Chief Administrative Law Judge D. Michael Chappell is not warranted. Respondent premises its motion on a desire to avoid the cost of discovery and other pretrial activities that might prove unnecessary depending on how the Commission resolves the pending motions. The expenses at issue, however, are normal consequences of litigation, routinely borne by litigants while dispositive motions are pending.

Generally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters.² In this instance, our concern for expedition is heightened by the fact that, as previously requested by Respondent, the presiding Administrative Law Judge and the Commission have already stayed this proceeding and delayed

¹ See also 16 CFR Parts 3 and 4: Rules of Practice: Proposed Rule Amendments and Request for Public Comment, 73 Fed. Reg. 58832, 58834 (Oct. 7, 2008) ("Rules 3.22 and 3.24 [if amended as proposed] would provide authority to the Commission to decide in the first instance all dispositive prehearing motions, including motions for summary decision, unless it refers the motion to the ALJ, while at the same time ensuring that the underlying proceedings are not stayed pending resolution of the dispositive motion absent a Commission order"); *id.* at 58836 ("The Commission anticipates that new paragraphs [3.22](b) and (e) would expedite cases by providing that proceedings before the ALJ will not be stayed while the Commission considers a motion, unless the Commission orders otherwise . . .").

² See 16 CFR Parts 3 and 4: Rules of Practice, 74 Fed. Reg. 1804, 1805 (Jan. 13, 2009) (explaining that in amending its rules for adjudicative proceedings, the Commission "intended . . . to balance three important interests: the public interest in a high quality decisionmaking process, the interests of justice in an expeditious resolution of litigated matters, and the interest of the parties in litigating matters without unnecessary expense").

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commencement of the evidentiary hearing by four months.³ Further stay and additional delay would not be appropriate. *Cf. North Carolina Bd. of Dental Exam'rs*, 150 F.T.C. 851 (2010) (denying a motion to stay proceedings in order to avoid pretrial expenses, pending the Commission's ruling on a motion to dismiss and a motion for partial summary decision).

Accordingly,

IT IS ORDERED that the Expedited Motion of Respondent Louisiana Real Estate Appraisers Board to Stay Part 3 Administrative Proceedings and Move the Evidentiary Hearing Date is hereby **DENIED**.

By the Commission.

³ The evidentiary hearing was originally scheduled to begin on January 30, 2018. On July 18, 2017, Respondent moved to stay the proceeding and to extend the commencement of trial to May 30, 2018. Complaint Counsel objected. On July 28, 2017, the presiding Administrative Law Judge stayed the proceeding for 90 days. Subsequently, the Commission granted a joint motion by Respondent and Complaint Counsel to stay the proceeding nearly an additional month and to move the commencement of trial to May 30, 2018. Order Continuing Stay and Postponing the Evidentiary Hearing (Oct. 26, 2017).

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IN THE MATTER OF

1-800 CONTACTS, INC.

Docket No. 9372. Order, January 19, 2018

Order staying proceedings and extending deadlines in the event of a lapse in appropriations.

ORDER REGARDING SCHEDULING

In the event that a lapse in appropriations results in a shutdown of most Commission operations, the Commission hereby directs that this proceeding be fully stayed during the duration of the shutdown and for an additional five business days thereafter. The oral argument date will be delayed -- and any pre-oral argument deadlines will be extended -- by the number of calendar days of this stay.

IT IS SO ORDERED.

By the Commission.

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IN THE MATTER OF

IMPAX LABORATORIES, INC.

Docket No. 9373. Order, January 19, 2018

Order staying proceedings and extending deadlines in the event of a lapse in appropriations.

ORDER REGARDING SCHEDULING

In the event that a lapse in appropriations results in a shutdown of most Commission operations, the Commission hereby directs that this proceeding be fully stayed for the duration of the shutdown and for an additional five business days thereafter. Any post-hearing deadlines will be extended by the number of calendar days of the stay. Accordingly,

IT IS SO ORDERED.

By the Commission.

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IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS
BOARD**

Docket No. 9374. Order, January 19, 2018

Order staying proceedings and extending deadlines in the event of a lapse in appropriations.

ORDER REGARDING SCHEDULING

In the event that a lapse in appropriations results in a shutdown of most Commission operations, the Commission hereby directs that the proceedings before the Administrative Law Judge shall be fully stayed for the duration of the shutdown and for an additional five business days thereafter. The evidentiary hearing date and any pre-hearing deadlines shall be extended by the number of calendar days of this stay. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendation to the Commission regarding an alternative hearing date. Absent further direction, the oral argument before the Commission regarding Respondent's Motion to Dismiss Complaint and Complaint Counsel's Motion for Partial Summary Decision remains scheduled for February 22, 2018. Accordingly,

IT IS SO ORDERED.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**TRONOX LIMITED,
NATIONAL INDUSTRIALIZATION COMPANY
(TASNEE),
NATIONAL TITANIUM DIOXIDE COMPANY
LIMITED (CRISTAL),
AND
CRISTAL USA INC.**

Docket No. 9377. Order, January 19, 2018

Order staying proceedings and extending deadlines in the event of a lapse in appropriations.

ORDER REGARDING SCHEDULING

In the event that a lapse in appropriations results in a shutdown of most Commission operations, the Commission hereby directs that this proceeding be fully stayed for the duration of the shutdown and for an additional five business days thereafter. The evidentiary hearing date and all pre-hearing deadlines will be extended by the number of calendar days of this stay. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendation to the Commission regarding an alternative hearing date. Accordingly,

IT IS SO ORDERED.

By the Commission.

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IN THE MATTER OF

**OTTO BOCK HEALTHCARE NORTH AMERICA,
INC.**

Docket No. 9378. Order, January 19, 2018

Order staying proceedings and extending deadlines in the event of a lapse in appropriations.

ORDER REGARDING SCHEDULING

In the event that a lapse in appropriations results in a shutdown of most Commission operations, the Commission hereby directs that this proceeding be fully stayed for the duration of the shutdown and for an additional five business days thereafter. The evidentiary hearing date and all pre-hearing deadlines shall be extended by the number of calendar days of this stay. The Administrative Law Judge retains discretion to adjust any such pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order or to make a recommendation to the Commission regarding an alternative hearing date. Accordingly,

IT IS SO ORDERED.

By the Commission.

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IN THE MATTER OF

**ZIMMER HOLDINGS, INC.,
LVB ACQUISITION, INC.,
AND
BIOMET, INC.**

Docket No. C-4534. Order, February 7, 2018

Letter Order granting the Application of Zimmer Biomet Holdings, Inc. to modify the agreements with DJO Global, Inc.

LETTER ORDER APPROVING MODIFICATIONS

Mr. George L. Paul, Esq.
White & Case LLP

Re: *In the Matter of Zimmer Holdings, Inc. and Biomet, Inc.*,
Docket No. C-4534

Dear Mr. Paul,

Pursuant to Rule 2.41(f) of the Commission's Rules of Practice, the Commission has determined to approve the Application of Zimmer Biomet Holdings, Inc. ("Zimmer") (December 6, 2017) to modify the agreements with DJO Global, Inc. which are incorporated into the Commission's Order in the above matter. In according its approval to Zimmer's Application, the Commission has relied upon the information submitted by Zimmer, and the Commission has assumed that information to be accurate and complete.

By direction of the Commission.

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IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS
BOARD**

Docket No. 9374. Order, February 16, 2018

Order denying respondent's motion to reconsider the Commission's January 12 order.

**ORDER DENYING RESPONDENT'S RENEWED EXPEDITED MOTION
TO STAY PART 3 ADMINISTRATIVE PROCEEDINGS AND MOVE THE
EVIDENTIARY HEARING DATE**

On January 10, 2018, the Commission issued an order scheduling oral argument on two pending motions in this proceeding - a Motion to Dismiss Complaint, filed by Respondent Louisiana Real Estate Appraisers Board, and a Motion for Partial Summary Decision, submitted by Complaint Counsel ("the pending motions"). The Commission's order scheduled oral argument on February 22, 2018, and moved the deadlines for the Commission's rulings on the pending motions to April 9, 2018.

One day later, Respondent moved (1) to stay the administrative proceeding until the Commission renders its decisions on the pending motions and (2) to delay the start of the evidentiary hearing from May 30, 2018 to August 27, 2018. Respondent argued that granting its motion would avoid expenses of pretrial activity that might prove unnecessary, depending on how the Commission resolves the pending motions. On January 12, 2018, the Commission denied Respondent's motion. The Commission found that routine discovery costs of the type that Respondent sought to avoid generally do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters. The Commission also noted that, as previously requested by Respondent, the Commission had already stayed the proceeding and delayed commencement of the evidentiary hearing by four months.

On January 31, 2018, Respondent requested that the Commission reconsider its January 12 order; stay the administrative proceeding until after the Commission renders its

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decision on the pending motions; and move the starting date for the evidentiary hearing to September 10, 2018. Again, Respondent cites the cost of litigation. It elaborates regarding the burdens and distractions that litigation imposes and urges that a stay could permit the resolution of important issues presented in this case regarding the state action doctrine in a manner least disruptive to its operations and budgetary concerns. Complaint Counsel have opposed Respondent's renewed motion.

Respondent has identified no changes in fact or law or other new considerations or circumstances that would warrant reconsideration. *Cf* Commission Rule of Practice 3.55 (limiting petitions for reconsideration to "new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission"). Viewed as a self-standing request, the renewed motion is largely a repetition and elaboration of arguments that Respondent has already made. For the same reasons stated in our January 12 order, Respondent's renewed motion is denied.

Accordingly,

IT IS ORDERED that the Renewed Expedited Motion of Respondent Louisiana Real Estate Appraisers Board to Stay Part 3 Administrative Proceedings and Move the Evidentiary Hearing Date is hereby **DENIED**.

By the Commission.

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IN THE MATTER OF

PEPSICO, INC.

Docket No. C-4301. Order, February 26, 2018

Letter Order extending the term of the Monitor's agreement for an additional three years.

LETTER ORDER APPROVING AMENDMENT TO THE MONITOR'S
AGREEMENT

Megan H. Hurley
Senior Vice President, General Counsel
PepsiCo North America Beverages
Quaker Foods North America

Eric A. Croson

Re: *In the Matter of PepsiCo, Inc., Docket No. C-4301*

Dear Ms. Hurley and Mr. Croson:

This letter serves to approve the Second Amendment to the Monitor's agreement originally approved by the Commission by letter dated September 27, 2010 (and amended by the First Amendment, which was approved by the Commission by letter dated March 27, 2015), and entered into as of February 1, 2018. The Second Amendment extends the term of the Monitor's agreement for an additional three years.

By direction of the Commission.

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IN THE MATTER OF

1-800 CONTACTS, INC.

Docket No. 9372. Order, February 26, 2018

Order scheduling oral arguments on appeal.

ORDER SCHEDULING ORAL ARGUMENT

The Respondent has filed its Appeal Brief perfecting its appeal from the Initial Decision in this matter; Counsel for the Complaint have filed their Answering Brief; and the Respondent has filed its Reply Brief. Commission Rule 3.52(b)(2) provides that the Commission ordinarily will schedule an Oral Argument within fifteen days after the date on which the Reply Brief is filed. Commission Rule 3.51(a) provides that the Commission may extend for good cause any of the time periods relating to an appeal of an Initial Decision. The Commission recognizes that a number of new Commissioners likely will be confirmed in the near future. Thus, the Commission has determined to conduct the Oral Argument in this matter on May 1, 2018, at 2 p.m. in Hearing Room 532 of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Each side will be allotted forty-five minutes to present its argument. Respondents will have the opportunity to open the argument and will be permitted to reserve time for rebuttal. If either side wishes to provide the Commission with a short written or electronic compilation of material to facilitate its presentation during the Oral Argument, any such compilation may contain only public information that is already in the record of the proceeding, and copies must be filed with the Secretary of the Commission and provided to opposing counsel no later than April 24, 2018 at 2 p.m.

By the Commission.

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IN THE MATTER OF**SEARS HOLDINGS MANAGEMENT
CORPORATION***Docket No. C-4264. Order, February 27, 2018*

Order granting respondent's petition to reopen and modify the Order by changing the definition of "Tracking Application" to exclude software applications that only engage in consumer-expected types of tracking.

ORDER REOPENING AND MODIFYING ORDER

On October 31, 2017, Sears Holdings Management Corporation ("Sears") filed a petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. § 2.51, asking the Commission to reopen and modify the Order in Docket No. C-4264 ("Order"), issued by the Commission on August 31, 2009.

The Order requires Sears, among other things, to provide clear and prominent notice of the types of information it collects through any tracking software it distributes—defined as a "Tracking Application"—and get consumers' express consent before they download or install the software. In its petition, Sears requests that the Commission modify the definition of Tracking Application as it relates to Sears's mobile applications.

Sears bases its petition on changed conditions of fact that it claims are sufficient to warrant reopening and modifying the Order. Sears asserts that neither it nor the Commission staff who negotiated the Order could have anticipated the tremendous growth of mobile applications, the consolidation in that market to very few platforms, or the importance to retailers such as Sears of being able to interact with customers through mobile applications. Sears argues that these changes have made the Order obsolete because of the significant control the platforms exercise over privacy and disclosures for mobile applications. Sears also argues that modifying the Order would be in the public interest because the current Order puts Sears at a competitive disadvantage in the mobile application market. Sears further contends that the

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Order's disclosure requirements are not in consumers' interest where the data collection by a mobile application is expected and benefits the application's function.

Sears requests that the Commission modify the definition of "Tracking Application" to exclude software applications that only engage in consumer-expected types of tracking. For the reasons stated below, the Commission has determined to grant the petition.

Background

On August 31, 2009, the Commission approved a final Complaint and Decision and Order against Sears. The Complaint states that, as part of a "MySHC Community" market research program, Sears offered \$10 to consumers to install a software application on their desktop personal computers. The Complaint alleges that Sears deceptively failed to disclose the full extent of the software's data collection. According to the Complaint, although Sears stated only that the software would track consumers' "online browsing," it in fact tracked nearly all internet activity on consumers' computers; monitored their activity in online secure sessions with other websites; and collected sensitive personal information from those sessions.

Part I of the Order requires Sears to provide clear and prominent notice to consumers of the full collection practices of any "Tracking Application" it offers, and obtain consumers' express consent to that data collection before they download or install the software. "Tracking Application" includes any software "capable of installation on consumers' computers" that is used to "monitor, record, or transmit information about activities occurring on computers on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which it is installed." The definition of "computers" encompasses mobile devices.

Parts II and III of the Order provide remediation to the consumers that downloaded Sears's software before the Complaint. Part II requires Sears to notify consumers who downloaded any Tracking Application (including the MySHC

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Community software) of the full extent of its tracking and collection, and provide them with instructions on how to uninstall it. Part III requires Sears to cease collecting any information through any Tracking Applications installed by consumers prior to service of the Order, and to delete any information Sears had previously collected through such software. The remaining Parts contain standard recordkeeping and reporting provisions.

Standard to Reopen and Modify

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” so require.¹ A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in law or fact and shows that the changes either eliminate the need for the order or make continued application of it inequitable or harmful to competition.² Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,³ and the burden remains on the requester in all cases to demonstrate why the order

¹ See *Supplementary Information, Amendment to 16 CFR § 2.51(b)*, announced August 15, 2000 (“Amendment”), 65 Fed. Reg. 50636 (Aug. 21, 2000).

² S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Order Reopening and Modifying Order 3, *Toys “R” Us Inc.*, Docket No. 9278 (FTC Apr. 11, 2014), https://www.ftc.gov/system/files/documents/cases/140415_toysrusorder.pdf. See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (holding that, even after reopening, FTC is not required to make requested modification unless changed circumstances compel it).

³ *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

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should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.⁴ All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.⁵

Changed Conditions of Fact Justify Reopening the Order

The Commission has determined that changed conditions of fact require that the Order be reopened.⁶ The Commission finds that, although the Order's terms and definitions apply to mobile applications, neither the Commission nor Sears anticipated the changes to the mobile application marketplace that would occur in the years since the Order was issued. At the time the Order was issued in 2009, the Android and Apple iOS app stores had both launched a year before. And the mobile application market was just beginning a transition from being dominated by primarily simple or novelty mobile applications to an ecosystem that businesses across the board would leverage. The Commission finds that, at the time, companies like Sears were focused on creating mobile-optimized versions of their websites.

The Commission further finds that the changes in the mobile marketplace since the Order have made it critical for retailers like Sears to be able to distribute interactive mobile applications. Today's mobile applications typically require the collection and transmission of many different types of data to support the services and features for which consumers have downloaded them, as Sears argues, and the Commission agrees that consumers expect this type of data collection.

⁴ See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (strong public interest considerations support repose and finality).

⁵ 16 C.F.R. § 2.51(b).

⁶ Sears has asserted both changed conditions of fact and public interest grounds in support of its petition. Because the Commission has determined that Sears has demonstrated that changed conditions of fact support reopening, the Commission need not consider whether the public interest also justifies reopening the Order.

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Sears has demonstrated that these changed conditions make application of the current Order unnecessary as it relates to Sears's suite of mobile applications. The Order's mandated disclosures are intended to place notice and consent obligations on Tracking Applications such as the MySHC Community software, which engaged in broad and unexpected monitoring of consumers' activity across the internet, or similar software. Significantly, the Order does not require heightened notice and consent for first-party tracking on Sears's websites through technologies such as cookies, which were common and expected at the time the Order was entered. However, there is no comparable exception in the Order for the same type of data collection when carried out by a mobile application. Thus, the heightened notice and consent requirements apply even to the most mundane mobile application engaged in first-party tracking only. For example, the Order requires prominent disclosures and express consent for an application that remembers the items a user places in the shopping cart when shopping within the application, or an application that collects the consumer's address when a consumer enters it in order to have a purchase shipped.

In the context of mobile applications that engage in the types of information collection that consumers expect, the Commission believes that the notice and consent requirements contemplated by the Order are burdensome and counterproductive, for both consumers and Sears.

From the consumer point of view, for the limited types of data collection that Sears proposes to exclude from the Order, the disclosure and consent requirements are counterproductive because they are unnecessary. Since issuing the Order, the Commission has recognized that some data collection is likely intrinsic to many internet-related business practices, and has advocated that companies provide consumers with choices about data collection and usage only when those practices are not consistent with the consumer's relationship with the company.⁷

⁷ See FTC Report, *Protecting Consumer Privacy in an Era of Rapid Change* 36-44 (Mar. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf> ("2012 Privacy Report")

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Likewise, the Commission has pushed for affirmative express consent—like that which the Order requires for software that collects any data—only for the collection and use of sensitive information.⁸

Under that framework, a mobile application that collects only data consistent with the context of consumers' interactions—for which the Commission has said no disclosure or choice are required—is not benefiting consumers by providing the Order-mandated disclosure and affirmative, express consent.⁹ And it may be confusing to some consumers. Some consumers may view Sears's very prominent disclosure and consent requirement as a positive indication of Sears's transparency. But others may take the request for express consent, in particular, as a signal that the types of data collected by Sears apps are unusual, or are used or shared in unusual ways or for unusual purposes that the consumer may not want or expect.¹⁰

As to Sears, the Commission credits that having to provide heightened disclosures and seek consumers' affirmative express consent for any and all information collection through a mobile application—when competitors need not do so—is disruptive to the initial application install flow, without providing a corresponding benefit to consumers.¹¹ The Commission concludes that these changed conditions of fact justify reopening the Order.

(indicating that data collection and use consistent with consumers' interaction with a first party may not require notice and choice).

⁸ *See id.* at 47-48, 58-60. The Commission also recognized the need for affirmative express consent when companies make material retroactive changes to privacy representations. *Id.* at 57- 58.

⁹ *See id.* at 38-39 (noting that the benefits of providing choice are reduced for data collection consistent with the context of a company's interaction with consumers).

¹⁰ *See* Petition at 11.

¹¹ *See* Petition at 15-18.

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Comments on Reopening

In making this determination, the Commission has considered the fact that many of the twelve public comments filed in this proceeding oppose reopening the Order. The comments raise two areas of concern related to reopening. First, two comments argue that Sears has not made a satisfactory showing that changed circumstances warrant reopening. The World Privacy Forum argues that Sears failed to provide sufficient evidence that the Order-mandated disclosures caused it to lose customers. However, the Commission does not agree that such evidence is necessarily required to find that changed circumstances justify reopening: As noted above, we credit Sears's argument that the heightened disclosure and consent requirement is unnecessary for the particular types of collection Sears proposes to be excluded from the Order, and in some cases even disruptive to consumers onboarding its mobile applications.¹² Indeed, on the policy front, the Commission has moved since the Order toward less disclosure for expected information collection, not heightened requirements.¹³

Similarly, commenter Chris Hoofnagle argues that Sears has not met the standard because mobile applications behave fundamentally the same as they did at the time the Order was issued. But Sears's argument, and the Commission's finding, is not based on changes to the capabilities of mobile applications. It is based on changes in the mobile marketplace that have made it much more important for retailers to be able to provide mobile applications to interact with their customers, including applications that collect information in order to provide consumers with features.

Second, several commenters raise general concerns about data collection by Sears or businesses in general. Some of these comments also stress the importance of transparency and clarity in companies' disclosures. The Commission understands the commenters' concerns about maintaining the Order's strong

¹² See *id.*; Affidavit ¶¶ 9-12.

¹³ See 2012 Privacy Report at 36-44.

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protections for consumer privacy. It agrees that the Order should continue to require heightened disclosure and consent requirements for broad, unexpected information collection, whether through personal computer software or mobile applications. Indeed, if Sears distributes software that monitors consumers' activities across mobile applications, the modified Order would still require Sears to provide a clear and prominent notice and obtain consumers' express consent. However, the limited modifications to the Order described in the following section will continue to fulfill the goal of maintaining strong protections for privacy, without unduly burdening consumers or Sears.

The Order Should Be Modified

After considering and balancing all of the reasons for and against modification, the Commission has determined that the Order should be modified to alter the definition of "Tracking Application." Sears proposes the Commission add an exception to the definition. The modified definition would exclude from the heightened notice and consent requirements any software that tracks only "(a) the configuration of the software program or application itself; (b) information regarding whether the software program or application is functioning as represented; or (c) information regarding consumers' use of the program or application itself." The Commission finds that Sears's proposed modification is an effective means of addressing the changed conditions of fact discussed above.

Sears's proposed exception to the "Tracking Application" definition would make it very similar to comparable definitions in subsequent, similar FTC orders against *Compete, Inc.* and *Upromise, Inc.*¹⁴ These matters also involved software that allegedly deceptively collected information about consumers'

¹⁴ See Decision and Order 3, *Compete, Inc.*, FTC Docket No. C-4384 (Feb. 20, 2013) (definition of "Data Collection Agent"), <https://www.ftc.gov/sites/default/files/documents/cases/2013/02/130222competedo.pdf>; Decision and Order 3-4, *Upromise, Inc.*, FTC Docket No. C-4351 (Mar. 27, 2012) (definition of "Targeting Tool"), <https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120403upromisedo.pdf>.

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online activity. Similar to the complaint against Sears, the Commission alleged that Compete and Upromise each represented that their browser toolbars would collect basic information about consumers' internet browsing, but failed to disclose that their toolbars would in fact comprehensively track users' online behavior.¹⁵ The exceptions in those orders, like the one that Sears proposes, exclude software that conducts types of data collection that consumers would expect.¹⁶

Comments on Proposed Modification

Two of the comments received by the Commission provide input on the proposed modification. Although these commenters do not broadly oppose the first two exceptions from the notice and consent requirements, which would allow Sears to use tracking software for configuration and testing purposes,¹⁷ they do oppose the third exception, which would allow Sears to track "information regarding consumers' use of the program or application itself." Generally, the objections fall into three categories.

¹⁵ The *Compete, Inc.* complaint alleges that the company represented that its Toolbar would collect "aspects of [consumers'] browsing behavior" and "the addresses of the web pages you visit online." Complaint at 2-3, *Compete, Inc.*, FTC Docket No. C-4384 (Feb. 20, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/02/130222competecmpt.pdf>. Similarly, the *Upromise, Inc.* complaint alleges that the company represented that its Toolbar collected "information about the web sites you visit." Complaint 2-3, *Upromise, Inc.*, FTC Docket No. C-4351 (Mar. 27, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120403upromi secmpt.pdf>. But in both cases, the companies allegedly collected extensive information from the websites consumers visited, including information from secure sessions on third-party websites.

¹⁶ See Note 14, *supra*.

¹⁷ The World Privacy Forum expresses concern in its comment that the first two exceptions could enable technologies such as browser fingerprinting, or presumably, in the context of mobile applications, device fingerprinting. Comment of World Privacy Forum at 4. The Commission does not agree that identifying a consumer's device through fingerprinting relates to the application's configuration or functionality, and thus does not agree that fingerprinting is excepted under one of the first two exceptions.

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First, Consumers Union, Consumer Federation of America, and the Center for Digital Democracy argue in their joint comment that the proposed exception would allow for a greater degree of information collection than prior FTC orders.¹⁸ For example, they argue that the recent FTC order against *Vizio, Inc.* does not contain any exceptions to the notice and consent requirements. But the *Vizio* order applies only to the narrow category of “Viewing Data.”¹⁹ The *Sears* Order, by contrast, applies to a broad scope of information: “information about activities occurring on computers on which [a tracking application] is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which [the tracking application] is installed.” Because the *Vizio* order applies only to a narrow category of information, unlike *Sears*, an exception was not necessary.

Likewise, Consumers Union *et al.* assert that an analogous exception in the *Upromise, Inc.* order is narrower than the one proposed by Sears.²⁰ Accordingly, the commenter recommends that the Commission add a further limitation to the third exception modeled on *Upromise*, restricting the third exception to instances when “the data collection is reasonably expected and necessary

¹⁸ Comment of Consumers Union, Consumer Federation of America, and the Center for Digital Democracy at 7-11.

¹⁹ See Stipulated Order for Perm. Inj. and Monetary J. 3-4, *FTC v. Vizio, Inc.*, No. 2:17-cv-00758 (D.N.J. Feb. 6, 2017), https://www.ftc.gov/system/files/documents/cases/170206_vizio_stipulated_proposed_order.pdf.

²⁰ Comment of Consumers Union *et al.* at 10. The Commission disagrees that the exception proposed by Sears is broader than the analogous *Upromise* exception. Both limit the collection of data to that which stems from the purpose for which the consumer uses the application. In *Upromise*, the exception encompassed data collection across multiple sources of potential consumer data—“respondent’s websites, services, applications, and/or forms”—provided the collection stem from provision of “reward service benefits.” Decision and Order 3-4, *Upromise, Inc.*, FTC Docket No. C-4351 (Mar. 27, 2012) (definition of “Targeting Tool”), <https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120403upromisedo.pdf>. Whereas Sears’s proposed exception is limited to data collection regarding only one source: the consumer’s use of the data-collecting application itself. In both cases, the exceptions are tailored to ensure that only expected types of data collection are excluded from the order.

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for the software to perform the function or service that the consumer requests, and that information is only collected, retained, or used as is necessary for those purposes.”²¹ The Commission believes that, here, such a limitation would restrict Sears from providing valuable product offerings without a commensurate benefit to consumers. If Sears could only satisfy the exception when collecting data for functions a consumer requests, Sears would be unable to provide some anticipatory services to consumers—like making product recommendations based on a consumer’s past shopping within the application—without providing notice and obtaining express consent. The Commission believes that Sears’s proposed exception better aligns with consumers’ expectations by requiring the data collection to stem from a consumer’s “use” of the application, rather than only functions a consumer requests.

Second, the World Privacy Forum and Consumers Union *et al.* argue in their comments that the exception may allow Sears to engage in unexpected methods of tracking or data collection in mobile applications, such as keystroke logging, third-party tracking, collection of information outside of an application, or collection of information through links contained in an application.²² The Commission does not believe that the proposed exception would allow any of these activities. The exception is limited to the consumer’s “use” of the program or application itself, and would not allow for the type of passive tracking, cross-application tracking, or third-party tracking contemplated by the commenters. In order for the exception to apply, any information a Sears application accesses or collects must relate to some functionality the application is providing to the consumer in performing a service the consumer expects.

Third, Consumers Union *et al.* argues that the proposed exception might enable Sears to evade the mobile operating systems’ built-in notice and consent system (permissions) when accessing device data like geolocation.²³ The Commission does

²¹ Comment of Consumers Union *et al.* at 13.

²² *See id.* at 7, 12; Comment of World Privacy Forum at 4.

²³ Comment of Consumers Union *et al.* at 12.

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not see how this could occur. The Order cannot provide a technical means for Sears to get around the mobile operating systems' controls, and it does not impose conditions on the operating system developers.

Finally, the World Privacy Forum advises that the Commission should not rely on the mobile application platforms to protect consumers, as Sears suggests they do. The Commission does not rely on this argument, however, and does not believe the proposed exception rests on the existence of those controls. Instead of excluding all mobile applications from the Order, the proposed modification draws a distinction between software that tracks information that consumers would expect and software that engages in unexpected tracking—like the MySHC Community software—and thus warrants increased transparency. The modified Order's disclosure and consent requirement would still apply to the latter, including mobile applications.²⁴

Considering all the reasons for and against the modification, the Commission concludes that Sears's proposed modification is the best means to address the changed conditions of fact discussed above.

Conclusion

For the reasons explained above, the Commission has determined to reopen and modify the Order. Accordingly,

IT IS ORDERED that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that the definition of "Tracking Application" be, and it hereby is, revised to read:

²⁴ Commenter Chris Hoofnagle appears to express concern about modifying the Order to exclude mobile applications completely. The Commission agrees with this concern, but believes the proposed modifications are a technology-neutral way to ensure that the Order's requirements apply similarly to websites and mobile applications. The modified Order would still apply to mobile applications that tracked consumers in unexpected ways.

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4. "Tracking Application" shall mean any software program or application disseminated by or on behalf of respondent, its subsidiaries or affiliated companies, that is capable of being installed on consumers' computers and used by or on behalf of respondent to monitor, record, or transmit information about activities occurring on computers on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which it is installed, unless the information monitored, recorded, or transmitted is limited solely to the following: (a) the configuration of the software program or application itself; (b) information regarding whether the software program or application is functioning as represented; or (c) information regarding consumers' use of the program or application itself.

By the Commission.

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IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS
BOARD**

Docket No. 9374. Order, April 10, 2018

Opinion and Order denying Respondent's Motion to Dismiss Complaint and granting Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's Third and Ninth Affirmative Defenses.

OPINION AND ORDER OF THE COMMISSION

By Maureen K. Ohlhausen, Acting Chairman:

Federal antitrust law plays a crucial role in our economy, serving as “a central safeguard for the Nation’s free market structures,”¹ by protecting U.S. consumers from anticompetitive conduct. In our federal system, individual states are sovereigns that retain substantial authority to regulate the commerce that occurs within their borders, including displacing competition. Because “[s]tate agencies are not simply by their government character sovereign actors,”² however, antitrust law has a legitimate role in challenging certain types of government-related activities that restrain competition.

The state action doctrine guides this analysis. When an action is truly that of the state sovereign, antitrust law gives way. But immunity for anticompetitive action by state agencies “requires more than a mere facade of state involvement”³ States can ensure immunity is available to their agencies by adopting clear policies to displace competition, and, if those agencies are controlled by market participants, by providing active supervision.⁴

¹ *North Carolina State Board of Dental Examiners v. FTC*, 135 S.Ct. 1101, 1109 (2015) (“*N.C. Dental*”).

² *Id.* at 1114.

³ *Id.* at 1111.

⁴ *See id.* at 1115-16.

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To be clear, neither antitrust enforcement nor the state action doctrine is a vehicle for the federal government to micromanage the affairs of the sovereign states.⁵ Instead, the state action doctrine only arises in relation to anticompetitive conduct that, if not done by a sovereign actor, violates federal antitrust law. Thus, the critical inquiry is “whether the State’s review mechanisms provide ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’”⁶

This matter presents one of the most common scenarios in which state action issues arise: a state board with market participants exercising regulatory oversight of their own industry or profession. Although oversight by industry participants, with or without the involvement of the state, can have socially beneficial and even laudatory purposes, such arrangements can also present significant antitrust concerns. Indeed, “[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor.”⁷

One critical check on such influences is the requirement of “active supervision” by the state sovereign of active market participants exercising regulatory powers. The appropriate scope of the active supervision requirement in the state action defense is the central issue raised by the instant Motions we decide here.

Respondent, the Louisiana Real Estate Appraisers Board (“LREAB” or “the Board”), is a ten-member board that regulates

⁵ *Id.* at 1110 (“If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States’ power to regulate.”).

⁶ *Id.* at 1115-16 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-101 (1988)).

⁷ *Id.* at 1111.

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the practice of real estate appraisals in Louisiana. *See* La. Rev. Stat. §§ 37:3394, 37:3395. By statute, at least eight of its members must be Board-licensed appraisers. On May 31, 2017, the Commission issued a Complaint alleging that the Board had unreasonably restrained price competition for appraisal services provided to appraisal management companies (“AMCs”) by adopting in 2013 and subsequently enforcing a regulation known as Rule 31101. In its Answer, the Board invoked the state action defense, asserting that the challenged conduct is exempt from antitrust scrutiny.

The legal landscape has not been static following issuance of the Complaint. Beginning with an executive order issued by the Louisiana Governor on July 11, 2017, the State of Louisiana and the Board have implemented a series of administrative changes (without any changes in the underlying statutory scheme) intended to increase the level of state supervision over the Board’s actions and shield it from antitrust review. The Board revoked the original Rule 31101, reissued it in identical form under the new procedures, and entered into a contract with a state administrative agency to review certain of its enforcement decisions. In light of these changes, the Board has moved to dismiss the Complaint as moot. Complaint Counsel argue that the changes do not moot the proceeding and have moved for partial summary decision on the Board’s state action defense.

We conclude that the evidence proffered by the Board is insufficient to demonstrate that the State of Louisiana actively supervised the reissuance of Rule 31101 in 2017, or that it will actively supervise enforcement proceedings under the Rule in the future. The contours of the active supervision requirement are flexible and context-dependent. However, they require, at minimum, a more substantive engagement by the State in a review mechanism that provides assurance that the actions of a board regulating its own profession promote state public policy, rather than the private interests of the profession. Accordingly, we deny the Board’s Motion to Dismiss the Complaint. We further conclude that there is no genuine dispute of fact either that the Board is subject to the active supervision requirement or that the Board’s conduct prior to 2017 was not actively supervised. We therefore grant Complaint Counsel’s Motion for Partial

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Summary Decision on Respondent's Third and Ninth Affirmative Defenses.

BACKGROUND

The Board

The Louisiana Legislature has given the LREAB broad authority to regulate real estate appraisals, including the power to issue licenses, set standards, issue rules and regulations, and conduct disciplinary proceedings, including proceedings to suspend or revoke licenses or to censure or fine licensees. La. Rev. Stat. § 37:3395. The Board also licenses and regulates AMCs, which act as agents for lenders in arranging for real estate appraisals, and thus effectively function as the purchasers of appraisal services. *Id.* §§ 37:3415.2(2), 37:3415.3.

Since August 1, 2014, the Board has consisted of ten members appointed by the Louisiana Governor, all drawn from real estate-related businesses. *Id.* § 37:3394(B). Two are selected from a list submitted by the Louisiana Bankers Association. *Id.* § 37:3394(B)(1)(a). Seven members must be certified real estate appraisers who have been licensed by the Board for at least five years, including at least four “general appraisers” and two “residential appraisers.” *Id.* §§ 37:3394(B)(1)(c), (B)(2). General appraisers are licensed “for appraisal of all types of real estate regardless of complexity or transaction value.” *Id.* § 37:3392(7). By contrast, residential appraisers are licensed “to appraise one to four residential units, without regard to transaction value or complexity, and perform appraisals of other types of real estate having a transaction value of two hundred fifty thousand dollars or less.” *Id.* § 37:3392(13). The last member must be an employee or representative of a Louisiana-licensed AMC, who must also be a Board-licensed appraiser. *Id.* § 37:3394(B)(1)(b).⁸

⁸ Prior to August 1, 2014, there was no AMC representative and the Board had only nine members, but its composition was otherwise the same. *See* La. Rev. Stat. § 37:3394(B) (2013).

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Initial Adoption of Rule 31101

The Truth in Lending Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, provides that lenders and their agents must compensate appraisers “at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised.” 15 U.S.C. § 1639e(i)(1). These provisions of the statute appear within a section of the law focused on ensuring “appraisal independence” and detail various prohibited practices, such as bribery or other coercion aimed at improperly influencing valuations provided by appraisers. Louisiana adopted a similar “customary and reasonable” rate requirement in 2012. La. Rev. Stat. § 37:3415.15(A) (added by Act of May 31, 2012, No. 429, 2012 La. H.B. 1014).

In 2013, the Board first adopted the regulation at the heart of this dispute. Rule 31101 specifies how AMCs must comply with the customary and reasonable requirement. *See* La. Admin. Code tit. 46, pt. LXVII, § 31101 (2017).⁹ It provides that AMCs can demonstrate compliance by using “objective third-party information such as government agency fee schedules, academic studies, and independent private sector surveys” or by using a schedule of fees established by the Board. *Id.* AMCs not using one of these methods must, at a minimum, review a set of six factors on each assignment made and then “make appropriate adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable.” *Id.* § 31101(A).

Pursuant to Louisiana law, the Board sent Rule 31101 to the relevant oversight subcommittees in the Louisiana Legislature before it was formally issued. *See* La. Rev. Stat. § 3415.21(B) (2013) (repealed by Act of June 19, 2014, No. 764, 2014 La. S.B. 575); La. Rev. Stat. § 49:968; Unangst Aff. ¶ 33.¹⁰ Neither the

⁹ For convenience, we cite to the current version of the rule, which (as discussed in the text) is identical to the version promulgated in 2013.

¹⁰ We use the following abbreviations for purposes of this opinion:
Compl.: Complaint

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House nor the Senate subcommittee held a hearing, thereby allowing the Rule to go into effect as proposed. *Id.* ¶ 34. The Louisiana Governor had authority to disapprove Rule 31101, but issued no disapproval order. *Id.* ¶ 36.

Complaint and Answer

The Complaint alleges that Rule 31101 amounts to an unlawful restraint of competition on its face because it prohibits AMCs from arriving at an appraisal fee through the operation of the free market. Compl. ¶¶ 30-31. It also alleges that the Board has unlawfully restrained price competition by its enforcement of the Rule, because it effectively requires AMCs to set rates at least as high as those set forth in a survey conducted by the Southeastern Louisiana University Business Research Center. *Id.* ¶¶ 32-43. It alleges that the Board was “controlled at all relevant times by active market participants.” *Id.* ¶ 6.

The Board’s Answer denies that the Rule unlawfully restrains competition either on its face or as applied and asserts several affirmative defenses. As relevant to these Motions, the Third Affirmative Defense states, “The Complaint fails adequately to allege that the Board has a controlling number of active participants in the relevant residential appraisal market” (emphasis omitted), and the Ninth Affirmative Defense states that the Board “is immune from federal antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943).”

MTD: Memorandum of Points and Authorities in Support of Motion of Respondent Louisiana Real Estate Appraisers Board to Dismiss the Complaint
CCOpp: Complaint Counsel’s Opposition to Respondent’s Motion to Dismiss the Complaint

RRB: Reply in Support of Respondent Louisiana Real Estate Appraisers Board Motion to Dismiss

RX: Respondent’s Exhibits (attached to MTD)

MPSD: Memorandum of Law in Support of Complaint Counsel’s Motion for Partial Summary Decision

ROpp: Memorandum of Respondent Louisiana Real Estate Appraisers Board in Opposition to Complaint Counsel’s Motion for Partial Summary Decision

Unangst Aff.: Affidavit of Bruce Unangst (attached to ROpp)

Tr. Oral Arg.: Transcript of Oral Argument on Respondent’s Motion to Dismiss and Complaint Counsel’s Motion for Partial Summary Decision (Feb. 22, 2018)

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Post-Complaint Events

Following issuance of the Complaint, Louisiana officials and the Board took several steps intended to increase the level of state supervision over the Board's conduct and thereby insulate the Board from antitrust scrutiny. Those efforts began on July 11, 2017, when Louisiana's Governor issued an executive order directing changes both in the way the Board promulgates rules relating to the customary and reasonable fee requirement and in the way it enforces those rules. RX1.

1. Promulgation of Rules

The executive order directs the Board to submit any proposed rule, along with the rulemaking record, to the state Commissioner of Administration (or the Commissioner's designee) for approval, rejection, or modification. It directs the Commissioner (or his/her designee) to review the proposed rule to "ensure that [it] serves Louisiana's public policy of protecting the integrity of the residential mortgage appraisals by requiring that the fees paid by AMCs for an appraisal are to be customary and reasonable." RX1, at § 2.

In light of this directive, on July 31, 2017, the Board apparently voted to repeal Rule 31101 and adopt a "Replacement Rule" with precisely the same language. MTD at 9.¹¹ By letter dated August 14, 2017, the Commissioner of Administration advised that it was his opinion that the proposed Rule would further Louisiana public policy. RX3. The Board thereafter proceeded to solicit public comments and hold a hearing. It then submitted the proposed Rule, along with the comments and hearing transcript, to the relevant legislative oversight subcommittees and provided the comments and transcript to the Commissioner of Administration. Neither the House nor the Senate subcommittee held a hearing, and the reissued Rule 31101 became effective in November 2017 upon publication in the *Louisiana Register*. MTD at 14; RX 12-14.

¹¹ The Board has not submitted records of the July 31 vote or a copy of what it allegedly sent to the Commissioner of Administration.

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2. Enforcement Proceedings

The executive order also called for the State of Louisiana's Division of Administrative Law ("DAL") to review certain Board enforcement actions. Specifically, it provided that before finalizing a settlement with or filing an administrative complaint against an AMC regarding compliance with the customary and reasonable fee requirement, the Board would submit the proposed action to the DAL for approval, rejection, or modification. The executive order stated that the purpose of the review is "to ensure fundamental fairness and that the proposed action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such an appraisal are customary and reasonable." RX1, at § 1.

The executive order also directed the Board to enter into a contract with the DAL to establish the review procedures. In accordance with this directive, the Board and the DAL entered into a memorandum of understanding ("MOU") that specifies the procedures and standards for the DAL's review. RX9.

In addition, following issuance of the executive order, the Board closed all pending investigations under the original Rule 31101. RX10. The Board asserts that all enforcement actions based on the Rule prior to its reissuance in November 2017 either expired by their own terms or were vacated or terminated with no finding of violation, and that any prior payments or enforcement actions will not be admissible in future proceedings. *Id.* Any future enforcement actions will be based upon the reissued Rule 31101 (which, again, is identical to the original Rule 31101) and will be subject to the review procedures set forth in the executive order and the MOU.

THE STATE ACTION DOCTRINE

In *Parker v. Brown*, the Supreme Court held that the Sherman Act does not reach anticompetitive conduct by states acting in their sovereign capacity. 317 U.S. at 350-51. The Court has applied the same rule in antitrust cases brought by the Commission under Section 5 of the FTC Act, 15 U.S.C. § 45. *See, e.g., N.C. Dental*, 135 S. Ct. at 1111-14; *FTC v. Phoebe*

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Putney Health Sys., 568 U.S. 216, 219 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

The Court has long held that two conditions must be satisfied for private parties to avail themselves of the state action doctrine to avoid antitrust liability: first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy, and second, the policy must be actively supervised by the state itself. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980). In *N.C. Dental*, the Court held that the same test applies to “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates.” 135 S. Ct. at 1114. As noted above, the Court explained: “State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.” *Id.* at 1111. Rather, application of the doctrine “requires more than a mere facade of state involvement, for it is necessary in light of *Parker*’s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control.” *Id.* Thus, “*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State’s own.” *Id.*

The primary issues presented by these Motions concern the active supervision requirement. Active supervision is a “flexible and context-dependent” inquiry. *N.C. Dental*, 135 S. Ct. at 1116. It “need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. Rather, the question is whether the State’s review mechanisms provide realistic assurance that a nonsovereign actor’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.” *Id.* (internal quotation marks omitted).

The Court recognized, however, several “constant requirements” for active supervision. *Id.* First, “the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.” *Id.* Second, “the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy.” *Id.* Third, “the ‘mere potential for state supervision is not an adequate substitute

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for a decision by the State.” *Id.* (quoting *Ticor Title*, 504 U.S. at 638). Finally, “the state supervisor may not itself be an active market participant.” *Id.* at 1117.

With these principles in mind, we now turn to the two Motions before us. In addressing the state action issues, we emphasize that the question before us “is not whether the challenged conduct is efficient, well-functioning, or wise. Rather, it is whether anticompetitive conduct engaged in by nonsovereign actors should be deemed state action and thus shielded from the antitrust laws.” *Id.* at 1111 (citations, internal quotation marks, and internal brackets omitted).

THE BOARD’S MOTION TO DISMISS

We first consider the Board’s Motion to Dismiss. The Board argues that the case is now moot in light of “[r]ecent sovereign actions by the State of Louisiana” taken since July 2017. MTD at 1. It argues first that the Louisiana Legislature has clearly articulated a policy to displace competition in the market for residential real estate appraisal fees and that Rule 31101 effectuates that policy. *Id.* at 15-18. It then argues that the State actively supervised the reissuance of Rule 31101 in 2017 and has put procedures in place to ensure that any future enforcement of the Rule will be actively supervised. *Id.* at 18-22.¹² With respect to the reissuance of the Rule, the Board points to the review by the state Commissioner of Administration and the actions of the state legislative committees and various other state officials. With respect to enforcement, the Board primarily relies on the executive order and the review procedure established in the MOU, as well as the availability of judicial review. It argues that as a result it is “[b]eyond cavil” that “the State of Louisiana has accepted political accountability for any anticompetitive effects of promulgation or enforcement of Replacement Rule 31101.” RRB at 8. Finally, the Board argues that it has eradicated any ongoing effects of the pre-2017 enforcement of Rule 31101. MTD at 22-24. Because (in the Board’s view) the state action doctrine will shield its conduct going forward and there are no continuing

¹² For purposes of the Motion to Dismiss, the Board does not dispute that active supervision is necessary. *See id.* at 15 n.9.

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effects from the prior Rule, it argues that there is no reasonable expectation that the alleged violations can recur and no meaningful relief that the Commission can issue. *Id.* at 24-28.

Complaint Counsel oppose Respondent's Motion on several grounds. They contend that the regime that Louisiana has established to supervise Respondent's activities is "unproven, incomplete, and facially deficient." CCOpp at 1; *see also id.* at 22-32.¹³ According to Complaint Counsel, "The procedure for review of Respondent's regulation by the Commissioner of Administration is largely unknown. The procedure for review of Respondent's enforcement activities by an administrative law judge is defective on its face." *Id.* at 1. Moreover, say Complaint Counsel, even were the new supervision regime facially sufficient, "a supervision regime that looks fine on paper may fail in execution." *Id.* at 2. In the event we conclude "that there is both an antitrust violation and a facially adequate state action regime," Complaint Counsel argue, the case still would not be moot; in those circumstances Complaint Counsel urge that we issue an order that proscribes future anticompetitive conduct, but which might include a "State Action Proviso" that expressly allows future conduct that falls within the protections of the state action doctrine. *Id.* at 22; *see also id.* at 2.

We conclude that the Board has not shown that the reissuance and enforcement of Rule 31101 have been and will be actively supervised, and, thus, the Board has not met its burden to demonstrate mootness. We therefore do not address Complaint Counsel's argument that post-complaint changes to the supervision regime – even if facially sufficient to constitute active supervision – cannot moot the case.

Legal Standard

The Board correctly states that we review motions to dismiss under the standards of Rule 12 of the Federal Rules of Civil

¹³ Although Complaint Counsel do not concede that the clear articulation requirement has been satisfied, their briefing focuses on active supervision. CCOpp at 10 n.4. Because we find that active supervision has not been demonstrated, we do not address the clear articulation issue.

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Procedure, MTD at 3, but does not expressly address which provision of that rule applies here. In *South Carolina State Board of Dentistry*, 138 F.T.C. 229 (2004), cited by the Board, we considered a motion to dismiss on state action grounds under the standards of Rule 12(b)(6), which governs motions to dismiss for failure to state a claim. But in that case, the respondent challenged the sufficiency of the complaint's allegations based on the state action doctrine (although it also raised a claim of mootness based in part on post-complaint events). In this case, by contrast, the Board's Motion to Dismiss is not directed to the sufficiency of the Complaint. Rather, the Board contends that the case is moot in light of actions taken by Louisiana officials and the Board *after* the Complaint was issued.

Mootness is a justiciability issue and a motion to dismiss on this ground is properly evaluated under the standards of Rule 12(b)(1). *See, e.g., Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents*, 633 F.3d 1297, 1308 (11th Cir. 2011). The difference is significant because on a Rule 12(b)(1) motion, unlike a Rule 12(b)(6) motion, a court is not bound by the allegations of the complaint at least as to the jurisdictional facts. As to those facts, the court is "free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case." *Montez v. Dep't of the Navy*, 392 F.3d 147, 149 (5th Cir. 2004).

In this case, however, the basic facts relating to the Board's mootness argument do not appear to be in dispute. The Board has submitted 14 exhibits in support of its Motion and suggests that we take official notice of these materials. MTD at 3. Complaint Counsel challenge only two of these exhibits (RX12 and RX13), arguing that they are not official government records and that they recite facts that are a subject of dispute and hence not eligible for official notice. CCOpp at 26 & n.8. But as noted above, on a Rule 12(b)(1) motion, courts are not limited to matters that are judicially noticeable; they may consider any evidence going to the jurisdictional facts. *See Montez*, 392 F.3d at 149; *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002). Complaint Counsel have not challenged the authenticity of any of the Board's exhibits. Accordingly, we will consider all of the Board's exhibits to the extent they are relevant and assume for

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purposes of the Board's Motion that they are what they purport to be.

The standard for determining whether a case is moot is well settled. Ordinarily, the moving party must show that the challenged conduct has ceased and that there is no possibility that it could recur. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Of course, in this case, there has been no change in the language of Rule 31101, and the Board does not allege that the remaining challenged conduct – enforcement of the Rule in a manner that may restrain competition – has changed substantively. Rather, the Board contends that the effects of its past alleged violations have been eradicated, and that the state action doctrine shields its future conduct from antitrust scrutiny, such that the Commission can no longer grant any effective relief.

Thus, the critical question before us is whether the Board has shown that its conduct is protected by the state action doctrine going forward. After identifying certain key characteristics that typically contribute to active supervision, we separately address (i) whether the Board has shown that the state actively supervised the reissuance of Rule 31101, and (ii) whether the Board has shown that the state will actively supervise future enforcement of the Rule.

The Active Supervision Inquiry

We begin by discussing the showing that a board with a controlling number of active market participants must make to demonstrate that its conduct is actively supervised by the state. Citing *N.C. Dental*, the Board contends that “[a]ctive supervision exists where the supervisor: (1) reviews the substance of the anticompetitive decision, not merely the procedures followed to produce it; (2) has the power to veto or modify particular decisions to ensure they accord with state policy; and (3) is not itself an active market participant.” MTD at 19. Although the Supreme Court described these – along with the important consideration (entirely omitted from the Board's list) that the “mere potential for state supervision is not an adequate substitute for a decision by the State” – as “constant requirements,” *N.C. Dental*, 135 S. Ct. at 1116, it did not suggest that active

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supervision exists if and only if these requirements are satisfied. To the contrary, it eschewed a rigid formula, making clear that “the inquiry regarding active supervision is flexible and context-dependent” and that “the adequacy of supervision will depend on all the circumstances of a case.” *Id.* at 1116-17.

Our prior cases offer further guidance. In *Kentucky Household Goods Carriers Association, Inc.*, 139 F.T.C. 404 (2005), we explained that the Supreme Court decisions make clear that “a state official or agency must have ascertained the relevant facts, examined the substantive merits of the private action, and assessed whether the private action comports with the underlying statutory criteria established by the state legislature in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than private choice.” *Id.* at 416-17. After surveying case law from the circuit courts and prior Commission decisions, we identified three elements that should be considered as part of the active supervision analysis: (1) the development of an adequate factual record, including notice and an opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both quantitative and qualitative – of how the private action comports with the substantive standard established by the legislature. *Id.* at 420. We addressed the same three elements in *North Carolina Bd. of Dental Exam’rs*, 151 F.T.C. 607, 629 (2011). Although we cautioned in both cases that “no single one of these elements is necessarily a prerequisite for active supervision,” we noted that the absence of all of the factors would support a conclusion that the state had not adequately supervised the private actors’ activity. *Id.*; *Kentucky Household Goods*, 139 F.T.C. at 421.

These factors accord with the Supreme Court’s recent teachings in *N.C. Dental*. We emphasize again that these factors are merely guidelines; there is no one-size-fits-all set of immutable characteristics that a state supervising entity must satisfy in every context. The ultimate question is always simply “whether the State’s review mechanisms provide ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’” *N.C. Dental*, 135 S. Ct. at 1116 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988)). In general, when these three

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elements are all satisfied, a finding of active supervision is normally appropriate. However, when one or more of these factors are missing, it becomes increasingly likely that the scope of state supervision is inadequate.

Reissuance of Rule 31101

The Board contends that the State actively supervised the reissuance of Rule 31101 in two principal ways.¹⁴ First, the Louisiana Commissioner of Administration reviewed the Rule, in accordance with the Governor's executive order of July 11, 2017. Second, the Board submitted the Rule to the appropriate oversight subcommittees in the Louisiana Legislature. According to the Board, the subcommittee members "required no information, found no hearing necessary, and allowed promulgation to proceed." RRB at 6. The Board has not demonstrated that either of these procedures was sufficient to constitute active supervision.

The defects in the review by the Commissioner of Administration are readily apparent.¹⁵ As a preliminary matter, the Board has not submitted with its Motion what, if anything, it submitted to the Commissioner on July 31, 2017.¹⁶ But in any event, it is clear that the Board did not submit the Rule "along with its rulemaking record," as required by the executive order (RX1, § 2), because the rulemaking record was far from complete

¹⁴ The Board also notes that the staff director of the Louisiana Legislative Fiscal Office approved the Fiscal and Economic Impact Statement for the proposed Rule and that the *Louisiana Register* accepted the Rule for publication. These ministerial actions do not reflect any active supervision by state officials to ensure that the Rule furthers a state policy to displace the antitrust laws.

¹⁵ We express no view as to whether a review required by a governor's executive order, as opposed to one that the legislature has mandated by statute, is sufficient to satisfy the active supervision requirement.

¹⁶ At oral argument, counsel for Respondent stated that what the Commissioner of Administration looked at prior to his August 14, 2017 approval letter was "the promulgation record for the prior rule, prior Rule 31101." Tr. Oral Arg. at 14. While this material might have been relevant, the Commissioner could not reasonably have made the necessary determinations regarding the 2017 reissuance without reviewing the 2017 rulemaking record.

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at that time; the Board had yet to solicit public comment or conduct a hearing. Thus the first element we identified in *N.C. Dental* and *Kentucky Household Goods*, an adequate factual record with notice and opportunity to be heard, is not present here.¹⁷

Moreover, the record fails to show that the Commissioner “exercised sufficient judgment and control” to show that the reissuance of Rule 31101 was “a product of deliberate state intervention, not simply [an] agreement among private parties.” *Ticor Title*, 504 U.S. at 634-35. The Commissioner’s letter of August 14, 2017 approving the proposed Rule (RX3) consists of three sentences. The operative sentence reads: “After careful consideration of LREAB’s regulatory role, the circumstances leading to these proposed rules, and the goals sought by their promulgation, I am of the opinion that these rules will further the public policy of the State of Louisiana of protecting the integrity of the residential mortgage appraisals by requiring that the fees paid by AMCs for an appraisal are to be customary and reasonable.” We do not think that this qualifies as a “written decision on the merits” in any meaningful sense, and it certainly does not reflect any “specific assessment . . . of how the [Board’s] action comports with the substantive standard established by the legislature.” *N.C. Dental*, 151 F.T.C. at 629. The letter merely recites the standard set forth in section 2 of the executive order, with no analysis, discussion, or explanation of the Commissioner’s reasoning. Under the circumstances – including the fact that the Board was proposing to reissue, word-for-word, the same rule it had issued in 2013 – the letter strongly suggests that the Commissioner simply rubber-stamped the Board’s decision.

The Board has also submitted a two-page letter from the General Counsel of the Division of Administration dated November 9, 2017. RX11. It states that the General Counsel reviewed materials submitted by the Board, including “a

¹⁷ We express no view as to whether review by the Commissioner of the factual record developed by the Board, as opposed to his own development of a factual record, would satisfy the first element of the framework we applied in *N.C. Dental* and *Kentucky Household Goods*.

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substantive history of Rule 31101, background information on Dodd-Frank and its requirements, the pertinent state and federal laws, the rulemaking record from the past promulgation of Rule 31101, as well as all documents and public comments related to the 2017 promulgation of the rule.” Based on that review, the General Counsel concluded that “all sides seem to be in agreement that the payment of customary and reasonable fees is an important public policy goal” and stated that “I believe that Rule 31101 achieves that public policy goal” because it “reasonably codifies the more general requirements set forth in law without becoming an inflexible, ‘one size fits all’ decree.” *Id.* at 2.

The General Counsel’s letter does not remedy the defects in the Commissioner’s earlier letter. Critically, on its face, the General Counsel’s letter disavows any authority to review the Rule: “[A]t this point of the rulemaking process, the legislative oversight committee and the Governor – not the DOA – have the formal authority to disapprove proposed rules.” *Id.* at 1. It states that under the executive order, “any action on the part of DOA to approve, reject, or modify the proposed rule was prior to its promulgation,” and that the Commissioner had already “approved the adoption of the rule via letter on August 14, 2017.” *Id.* By his own words, the General Counsel thus lacked “the power to veto or modify particular decisions” that the Supreme Court tells us “the supervisor must have.” *N.C. Dental*, 135 S. Ct. at 1116.

Moreover, although noting that the Real Estate Valuation Advocacy Association (representing a number of AMCs) had voiced concern that “Rule 31101 is unlawfully more restrictive than the federal requirements set forth in Dodd-Frank and its accompanying regulations,” the General Counsel brushed the issue aside, stating that it was “not the role of the [Division of Administration] to issue a legal opinion on the matter.” RX11, at 2. Although not quite as terse as the Commissioner’s earlier letter, the General Counsel’s letter still lacks any analysis or discussion of how the reissued Rule furthers Louisiana’s policy and whether the criticisms voiced in public comments identified flaws in the Rule or suggested viable improvements. It thus fails to satisfy the third criterion of *N.C. Dental* and *Kentucky Household Goods*, which looks at whether the state has provided

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“a specific assessment . . . of how the private action comports with the substantive standards established by the legislature.”

Nor has the Board shown that the Louisiana Legislature actively supervised the reissuance of the Rule. To the contrary, the materials submitted by the Board do not show that the Louisiana Legislature played an active role in supervising the Board’s reissuance of Rule 31101.

Louisiana law provides a procedure for legislative review of regulations proposed by an agency. *See* La. Rev. Stat. § 49:968.¹⁸ Briefly, when notice of the proposed rule is submitted to the *Louisiana Register* for publication, the agency must also submit a report to the presiding officers of each legislative house and the appropriate standing legislative committees containing, *inter alia*, a copy and brief summary of the rule, a statement of the circumstances that require its adoption, amendment or repeal, and statements of the fiscal and economic impact of the proposed action. *Id.* §§ 49:968(B)-(C). The chair of each standing committee appoints an oversight subcommittee, which “may conduct hearings” on the proposed rule. *Id.* § 49:968(D)(1)(a). The agency thereafter submits a second report to the subcommittees, which must include summaries of any hearing held by the agency and comments received by the agency. *Id.* § 49:968(D)(1)(b). If the subcommittee holds a hearing, it will determine whether the rule “is acceptable or unacceptable.” *Id.* § 49:968(D)(3)(d). But “[f]ailure of a subcommittee to conduct a hearing or to make a determination regarding any [proposed] rule . . . shall not affect the validity” of the rule. *Id.* § 49:968(E)(2). If neither the House nor the Senate subcommittee finds the proposed rule unacceptable, the agency may adopt it as proposed. *Id.* § 49:968(H)(1).

The materials submitted by the Board appear to show that this procedure was followed for the reissuance of Rule 31101.

¹⁸ We note that an additional statute governing legislative review of Board regulations that was in force in 2013 when Rule 31101 was originally adopted had been repealed by 2017. *See* La. Rev. Stat. § 3415.21(B) (2013) (discussed below in connection with Complaint Counsel’s Motion for Partial Summary Decision).

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According to the Board, no subcommittee member requested a hearing or submitted any questions about the proposed Rule. MTD at 14; RX12; RX13. At most, this shows a “potential for state supervision,” which the Supreme Court has held “is not an adequate substitute for a decision by the State.” *Ticor Title*, 504 U.S. at 638. This procedure is substantively similar to the “negative option rule” addressed in *Ticor Title*, under which state agencies had an opportunity to review rates proposed by private entities and “[t]he rates became effective unless they were rejected within a set time.” *Id.* Similarly, here, the Board’s proposed rules, establishing compensation rules set by active market participants, automatically become effective if not rejected by the legislative subcommittees in a set time. Here, as in *Ticor Title*, the failure of the state to act does not “signif[y] substantive approval,” *id.*, and thus does not demonstrate active supervision.¹⁹

Finally, the Board has also submitted no evidence that Louisiana’s Governor actively supervised the reissuance of Rule 31101. Respondent cites La. Rev. Stat. §§ 49:968(D)-(F) and 49:970 in arguing that every rule promulgated by the Board must be reviewed by the Governor. MTD at 19-20. La. Rev. Stat. §§ 49:968(D)-(G) provide for review by the Governor when a legislative oversight subcommittee finds that a proposed rule change is unacceptable, an event that did not occur here. La. Rev. Stat. § 49:970 permits the Governor to suspend or veto any rule or regulation of a state board within 30 days of its adoption, a procedure much like that which the Supreme Court found a mere

¹⁹ At oral argument, the Board’s counsel cited *Motor Transport Association of Connecticut, Inc.*, 112 F.T.C. 309 (1989), for the proposition that we have previously approved negative option procedures. Tr. Oral Arg. at 16. In *Motor Transport*, however, the record showed that the state public utilities commission “regularly review[ed] proposed tariffs and consider[ed] the reasonableness of proposed rates.” *Id.* at 349. The record contained specific examples of active oversight, including situations where the agency had suspended rules, held a hearing, and issued a written decision, and the record showed that the “when the [agency] allows a proposed rate to become effective without invoking its hearing procedures, that action results from the decision of the agency that the proposed rate meets the requirements of the statutes and regulations.” *Id.* (internal quotation marks and brackets omitted). There is no comparable evidence of active legislative supervision here, and nothing in *Motor Transport* suggests that a state’s decision not to hold a hearing on a proposed rule can be deemed active supervision.

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“potential for state supervision” that did not qualify as a “decision by the State.” *Ticor Title*, 504 U.S. at 638. Here, there is nothing in the record to suggest that the Louisiana Governor even looked at reissued Rule 31101, much less conducted the type of analysis that would be necessary to qualify as active supervision. Accordingly, we find the State of Louisiana failed to actively supervise the reissuance of Rule 31101.

Supervision of Enforcement Proceedings

Whether the changes to the Board’s procedures for enforcing Rule 31101 are sufficient to show active supervision is a more difficult question, complicated by the fact that the new procedures have never been implemented. As a starting point, *Ticor Title* makes clear that a program for state supervision that appears adequate on paper is not, by itself, sufficient to establish active supervision; state officials must actually exercise their supervision authority in a meaningful way. *See Ticor Title*, 504 U.S. at 637-38. In this case, however, certain features of the review procedure adopted by the Board are problematic on their face.

As noted above, the review procedure is spelled out in an MOU between the Board and the DAL, which is authorized to provide administrative law judges on a contractual basis for state agencies. *See* La. Rev. Stat. § 49:999.1.²⁰ The MOU provides that before “finaliz[ing] a settlement agreement with” or “filing an administrative complaint against” an AMC, the Board will “transmit its proposed action and the record thereof to the DAL.” RX9, § 4. The DAL then has 30 days to “approve, reject, or modify” the Board’s proposed action, and may remand the proceeding to the Board “with instructions or to obtain additional evidence for the record on review.” *Id.* § 5.

When the Board seeks to initiate an administrative complaint, the DAL will review the request to determine “(i) whether the

²⁰ We express no view as to whether an agreement on enforcement procedures between state agencies imposed pursuant to an executive order, as opposed to procedures that the legislature has mandated by statute, can be sufficient to satisfy the active supervision requirement. We note that the MOU procedures may be terminated by either party on 30 days’ notice. RX9, § 9.

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evidence presented is sufficient to show a likelihood that the AMC has not complied with the customary and reasonable requirements . . . and (ii) whether the proposed enforcement action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals.” *Id.* § 5(a). When the Board seeks approval of a “proposed settlement agreement, dismissal, or informal resolution of any DAL-approved enforcement action,” the DAL will “determine whether the proposed enforcement action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such appraisals are customary and reasonable in accordance with [Louisiana law].” *Id.* § 5(b).

The MOU also provides that the DAL “shall review the entirety of the hearing record and evidence of each enforcement proceeding conducted by the LREAB, the written proposed determination by the LREAB as to whether one or more violations by an AMC . . . have occurred, and any proposed remedy with respect to any such violation.” *Id.* § 5(c). The DAL will conduct this review according to the standards set forth in La. Rev. Stat. § 49:964(G), which governs judicial review of administrative adjudications.²¹ The DAL will review “all questions of law and statutory and regulatory interpretations . . .

²¹ Section 49:964(G) provides: The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

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without deference to the LREAB determinations.” RX9, § 5(c)(i). It will review findings of fact “in accordance with Section 964(G)(6), giving deference to the LREAB’s determination of credibility issues.” *Id.* § 5(c)(iii). And it will review the proposed remedy “in accordance with Section 964(G)(5), in light of the underlying policies of the State of Louisiana and the determination by the DAL of the findings of fact.” *Id.* § 5(c)(ii).

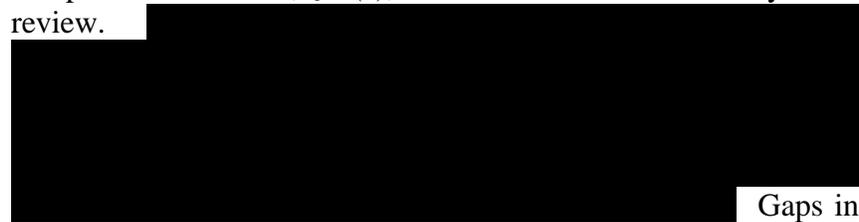
Without passing on the sufficiency of the other aspects of this scheme, we find the provision for review of the Board’s proposed remedy to be problematic.²² The remedy is likely to be a critical issue in Board enforcement proceedings, as the Board investigates, settles, and enters remedial orders resolving allegations that AMCs have failed to comply with the customary and reasonable fee requirements of La. Rev. Stat. § 37:3415.15(A) and has authority to suspend or revoke licenses and impose fines and civil penalties of up to \$50,000. *See* La. Rev. Stat. § 37:3415.19; RX1, at § 1; [REDACTED]. But under the MOU, the DAL would review the Board’s remedy only to determine if it is “[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” La. Rev. Stat. § 49:964(G)(5). This is a deferential standard that the Louisiana Supreme Court has described as “quite limited.” *Allen v. La. State Bd. of Dentistry*, 543 So. 2d 908, 915 (La. 1989). But “[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.” *Ticor Title*, 504 U.S. at 633. Application of such deferential review is insufficient to make the Board’s remedial determination “the State’s own,” or to ensure that the State has accepted “political accountability” for any anticompetitive conduct attributable to the Board. *See N.C. Dental*, 135 S. Ct. at 1111.

²² Complaint Counsel raise a number of other potential concerns, including that the ALJ reviews only the evidence before the Board; the review process is closed to consumers and many other potentially interested parties; the ALJ is required to defer to the Board’s determinations of credibility; and the MOU does not require the ALJ to issue a sufficiently detailed written decision.

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In *Patrick v. Burget*, the Supreme Court held that judicial review of the actions of private actors was not active supervision when the review was “of a very limited nature.” 486 U.S. at 104. Courts applying *Patrick* have consistently found that deferential forms of limited judicial review are not sufficient to qualify as active supervision. See *Pinhas v. Summit Health Ltd.*, 894 F.2d 1024, 1030 (9th Cir. 1989); *Shawahy v. Harrison*, 875 F.2d 1529, 1535-36 (11th Cir. 1989). We see no reason why the rule should be different when the State has provided for a deferential form of administrative review, rather than judicial review.²³

In addition, we find significant coverage gaps in the DAL’s review of the Board’s enforcement actions. DAL review of proposed settlement agreements, dismissals, and informal resolutions is limited to those resulting from “DAL-approved enforcement actions.” RX9, § 5(b). The entire realm of Board activity that never gives rise to a DAL-approved administrative complaint under RX9, § 5(a), is to be resolved without any DAL review.



Gaps in the coverage of DAL review both draw the sufficiency of supervision of enforcement proceedings into question and highlight the fact that an absence of supervision of the reissuance of Rule 31101 means that significant aspects of the Board’s activities receive no supervision whatsoever.

Conclusion

For the foregoing reasons, we conclude that the evidence proffered by the Board is insufficient to show either that the State of Louisiana actively supervised the reissuance of Rule 31101 in 2017 or that it will actively supervise enforcement proceedings under the Rule going forward. The Board’s contention that this

²³ The same consideration contributes to our conclusion that the potential for judicial review of the Board’s actions under the deferential standard of La. Rev. Stat. § 964(G) cannot constitute active supervision. See *infra* Section IV.C.

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case is moot rests critically on its claim that the state action defense shelters its future activities from antitrust scrutiny, leaving no conduct for the Commission to prevent and no relief for the Commission to grant. As noted above, for purposes of its Motion to Dismiss, the Board does not dispute that active supervision is necessary. Consequently, our conclusions regarding active supervision establish that the Board has failed to demonstrate a state action defense and that its mootness claim must fail. We therefore deny the Board's Motion to Dismiss.

COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

We turn now to Complaint Counsel's Motion for Partial Summary Decision. This Motion raises two main issues. First, is the Board subject to the active supervision requirement? This primarily turns on the resolution of a legal dispute regarding the proper interpretation of *N.C. Dental's* "active market participant" standard. Second, if the Board is subject to the active supervision requirement, did the State actively supervise the Board's conduct? We first set forth the governing legal standard, and then address these issues in turn.

The Legal Standard

We review Complaint Counsel's Motion under Rule 3.24 of our Rules of Practice, 16 C.F.R. § 3.24, which is "virtually identical" to Federal Rule of Civil Procedure 56, governing summary judgment in the federal courts. *N.C. Dental*, 151 F.T.C. at 607. "A party moving for summary decision must show that 'there is no genuine dispute as to any material fact,' and that it is 'entitled to judgment as a matter of law.'" *Jerk, LLC*, 159 F.T.C. 885, 889 (2015) (quoting Fed. R. Civ. P. 56(a)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Furthermore, once the moving party has adequately supported its motion, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*

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Corp., 475 U.S. 574, 586 (1986). It must instead establish “specific facts showing that there is a genuine issue for trial.” *Id.* at 587 (internal quotation marks and emphasis omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Id.* (internal quotation marks omitted).

Whether the Active Supervision Requirement Applies

N.C. Dental held that the active supervision requirement of the state action doctrine applies when “a controlling number of decisionmakers are active market participants in the occupation the board regulates.” 135 S. Ct. at 1114. The parties disagree sharply about what this language means. Complaint Counsel argue for a bright-line rule that the standard is satisfied when a controlling number of board members must be licensed to practice the occupation the board regulates – in this case, real estate appraisal. MPSD at 1, 9-13. Under this approach, it would not be necessary to distinguish between general appraisers and residential appraisers; both need Board licenses. Nor would it be necessary to consider to what degree particular Board members actually conduct residential appraisals or stand to benefit from Rule 31101.

The Board argues that we must undertake a much more fact-intensive inquiry. It contends that we must first define the “relevant market,” *see generally Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962), and then determine which Board members actually perform services within that market. In the Board’s view, the relevant market is limited to residential real estate appraisals for “covered transactions,” *i.e.*, those where the mortgage is secured by a consumer’s principal dwelling. ROpp at 27.

The Board’s approach would require us to scrutinize the actual business activities of Board members to determine whether they have “any cognizable pecuniary interest in the regulations at issue.” *Id.* at 28. The Board argues that its general appraiser board members lack such an interest and that only residential appraisers – who make up a minority of the Board – should be deemed active market participants. *Id.* at 27. At the very least, it

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asserts that there are factual questions regarding market definition and the degree to which general appraiser Board members participate in the residential market. *Id.* at 30.

The Board concedes that general appraisers can appraise residential property. But it argues that general appraisers “rarely” perform residential appraisals, and that “they may lack geographic or other competence factors necessary” for such work. *Id.* at 25. It has submitted eight affidavits from past or present Board members who are licensed as general appraisers.²⁴ Three of the affiants state that they did at least occasionally conduct residential appraisals during the time they served on the Board, with one stating that most of his residential appraisal work was in connection with VA loans – *i.e.*, residential mortgage loans.²⁵ Three other affiants state that they work for banks, in which capacity they reviewed appraisals rather than conducting them; they all state that they “occasionally” reviewed residential appraisals.²⁶ Five of these six individuals state that they do not consider residential appraisals to be a “significant” part of their business. The other two affiants state that they did not actively perform residential appraisals during their time on the Board and do not consider residential appraisals to be part of their business.²⁷

The Board further argues that we must determine whether its members “pursued proper policy or private interests,” and that this is also a fact-intensive inquiry that cannot be resolved on

²⁴ The Board also submitted additional affidavits (from some of the same individuals and some new ones), as well as a chart purporting to summarize the Board’s membership from 2011 to 2017, in connection with its opposition to Complaint Counsel’s separate, subsequent Motion for Partial Summary Decision on Respondent’s Fourth Affirmative Defense. These additional materials are not part of the record of the instant summary decision motion, but in any case do not change our disposition.

²⁵ See Affidavit of Leonard E. Pauley ¶¶ 4-5; Affidavit of Michael E. Graham ¶¶ 4-5; Affidavit of Rebecca Rothschild ¶ 5 (all attached to ROpp).

²⁶ See Affidavit of Heidi C. Lee ¶¶ 4-5; Affidavit of Clayton Lipscomb ¶¶ 4-5; Affidavit of Kara Ann Platt ¶¶ 4-5 (all attached to ROpp).

²⁷ See Affidavit of Cheryl B. Bella ¶ 5; Affidavit of Gayle Boudousquie ¶ 4 (all attached to ROpp).

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summary decision. *Id.* at 30. It argues that the Board has “[e]ssential . . . structural features that protect against members pursuing private over public interests.” *Id.* at 32. In particular, it argues that the Board’s membership represents different industry categories – general appraisers, residential appraisers, an AMC member (who must also be a licensed appraiser), and banking representatives – with no single category constituting a majority. *Id.* It notes that the Board members are not elected by industry members, as in *N.C. Dental*, but are appointed by the Governor and confirmed by the Louisiana Senate, and that the Governor may remove them at any time for cause. *Id.* And it further notes that the executive director of the Board, who by statute is the executive director of the Louisiana Real Estate Commission, is not selected by the Board (and hence is not under its control) and is not an appraiser. *Id.*

We conclude that Complaint Counsel’s approach is more consistent with both the case law and the underlying purpose of the active supervision requirement. The Board’s argument is very similar to one that we explicitly rejected in *N.C. Dental*. That case involved a rule issued by the State Board of Dental Examiners that barred non-dentists from performing teeth whitening services; in opposing summary decision, the board argued that Complaint Counsel had “presented no evidence that the individual dentist members of the Board . . . derived substantial revenues in their private practice from teeth whitening services.” *N.C. Dental*, 151 F.T.C. at 627. We rejected this argument, holding that “the determinative factor in requiring supervision is not the extent to which individual members may benefit from the challenged restraint, but rather the fact that the Board is controlled by participants in the dental market.” *Id.* Thus, although we noted that many of the dental board members did perform teeth whitening services in their private practices, our holding was “not predicated on the Board members’ actual financial interests.” *Id.* In affirming our decision, the Supreme Court likewise did not focus on the degree to which dental board members actually provided teeth whitening services. Rather, its decision turned on the fact that the dental board members participated in “the occupation the board regulates” – *i.e.*, dentistry. *N.C. Dental*, 135 S. Ct. at 1114.

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Applying those principles to this case, we conclude that the “occupation the board regulates” here is real estate appraisal. There is no dispute that by statute, seven of the ten Board members must be Board-licensed real estate appraisers with at least five years’ experience (not counting the AMC representative, who must also be a licensed appraiser). See La. Rev. Stat. § 37:3394(B)(1). This is thus a classic instance where the state has delegated authority to a private industry group to regulate itself, with only limited participation from other industry groups. We see no basis for drawing a distinction between general appraisers and residential appraisers, since the general appraisers are licensed to appraise residential property (and the Board’s own evidence shows that some of them do). Just as it was not necessary in *N.C. Dental* to determine whether individual dental board members performed teeth whitening services, it is not necessary here to probe whether particular Board members derive revenue from residential appraisals. It is enough that the Board licenses them to conduct such appraisals.

The Board’s argument that we must first define a “relevant market” and then determine the extent to which individual members participate in that market improperly conflates two distinct issues. Definition of the relevant market generally is a step in determining whether a practice is anticompetitive, by identifying the groups of products or the geographic areas of competition that could be subject to an exercise of market power. See, e.g., U.S. Dep’t of Justice & FTC, *Horizontal Merger Guidelines* §§ 4.1, 4.2 (2010). The “active market participant” test concerns a different issue: whether a board empowered by the state to regulate a given industry is, as a practical matter, controlled by that industry. If it is, a significant risk exists that the board will act to further the interests of the industry, rather than the public interest, and active supervision is required before the state action doctrine can be invoked.

Moreover, the Board’s proposed test would be difficult, if not impossible, to apply as a practical matter. Under the Board’s approach, it would be impossible to know whether a particular action required active supervision without first conducting an analysis of the relevant market affected by the action and the degree to which each Board member derived income from that

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market. Variations in the impact on individual members' revenues would require repeating this analysis every time the Board took a new action that potentially might give rise to an antitrust challenge. Such a regime would be extremely burdensome not only for the Board and its members, but also for agencies and courts tasked with reviewing such conduct.

The Board is correct that in *N.C. Dental*, we placed weight on the fact that the board members were elected by North Carolina dentists. 151 F.T.C. at 626-28. But the fact that Board members here are appointed by the Louisiana Governor, rather than elected, does not alter our analysis. The statute requires the Governor to appoint seven Board-certified appraisers with at least five years' experience, posing a significant risk that at least these seven Board members will represent the interests of their industry. Of course, there is nothing inherently wrong with such a structure, but a board that is controlled by representatives of the industry it regulates cannot shield itself from antitrust scrutiny unless the state actively supervises the board's activities.²⁸

Complaint Counsel are correct that the dispositive question is whether a controlling number of Board members are licensed to practice the occupation the Board regulates. This can be answered affirmatively without defining relevant antitrust markets or delving into the details of individual board members' income streams. It follows that there is no genuine dispute of material fact that would preclude summary decision on this issue. We hold that the Board is controlled by active market participants and is therefore subject to the active supervision requirement. We therefore grant partial summary decision in favor of Complaint Counsel as to the Board's Third Affirmative Defense.

Whether the Board's Prior Conduct Was Actively Supervised

The Board argues that Louisiana actively supervised both the initial promulgation of Rule 31101 in 2013 and the enforcement

²⁸ The Board's argument that its executive director is not an appraiser and is not selected by the Board need not detain us long, because the executive director is not a member of the Board and has no voting power.

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of that Rule prior to the adoption of new procedures in 2017. We reject these arguments for essentially the same reasons that we reject the Board's similar contentions in connection with its Motion to Dismiss Complaint.

The Board first contends that the Louisiana Legislature and the Governor actively supervised the promulgation of Rule 31101. ROpp at 19-21. The record shows just the opposite. In 2013, a Louisiana law (since repealed) provided that any rules issued by the Board required "affirmative approval" by the Louisiana House and Senate oversight committees. La. Rev. Stat. § 3415.21(B) (2013). But the statute also provided that "[i]f the board submits its proposed rules for affirmative approval and the legislature is not in session, the proposed rules shall be deemed affirmatively approved if forty-five days have elapsed from the date the proposed rules are received by the oversight committees and no hearing is held by either committee." *Id.* In other words, legislative *inaction* would be deemed affirmative approval.

In this case, the Board submitted its report on the proposed Rule to the Legislature on September 26, 2013. Unangst Aff. ¶ 33. The Legislature was not in session at that time. *Id.* ¶ 34. Neither the House nor the Senate subcommittee opted to hold a hearing, thus allowing the rule to take effect. *Id.* The Senate subcommittee originally scheduled a hearing, but then voted to remove it from the calendar after the Chairman explained that holding the hearing could trigger the affirmative approval requirement and prevent the proposed Rule from going into effect. *See id.* (citing a video recording of a hearing on the website of the Senate Commerce Committee at <http://senate.la.gov/video/videoarchive.asp?v=senate/2013/11/111313COM>).

The upshot is that there is no evidence that either committee engaged in substantive analysis of the reissued Rule. Although it is clear that the legislative oversight subcommittees could have conducted a substantive review, "[t]he mere 'potential for state supervision is not an adequate substitute for a decision by the State.'" *Ticor Title*, 504 U.S. at 638. Similarly, the fact that Louisiana's Governor allowed the Rule to proceed, *see* Unangst Aff. ¶ 36, does not show that he conducted the kind of substantive analysis necessary to satisfy the active supervision requirement.

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As discussed above with respect to the 2017 reissuance of the Rule, *see supra* Section III.C, *Ticor Title* makes clear that approval through this type of “negative option” procedure does not constitute active supervision.

The Board also contends that its enforcement decisions prior to 2017 were actively supervised because they were reviewable in state court under the Louisiana Administrative Procedure Act (“APA”). ROpp at 21-23; *see* La. Rev. Stat. § 49:964(G). In *Patrick*, the Supreme Court held that insofar as Oregon law provided for judicial review of the decisions at issue, the review was too limited to qualify as active supervision. 486 U.S. at 103-04. The Board correctly notes that *Patrick* did not absolutely preclude the use of judicial review as active supervision, but it cites no case holding judicial review to be adequate. And *Ticor Title* and *N.C. Dental* make clear that the “mere potential” for state supervision is inadequate. *N.C. Dental*, 135 S. Ct. at 1116 (quoting *Ticor Title*, 504 U.S. at 638). Here, although Louisiana law provides for judicial review of Board enforcement decisions, it does not require such review. In many cases, parties aggrieved by a Board enforcement decision might decide not to undertake the burden and expense of a court challenge; in such cases, the Board’s decision would never be reviewed. This amounts to at most potential supervision.

Furthermore, judicial review of the Board’s decisions takes place under a deferential standard. The Board’s governing statute provides for judicial review of “questions of law” involved in any final decision of the Board. La. Rev. Stat. § 37:3415.20(B)(1). Under the statute, “[i]f the court finds that the Louisiana Real Estate Appraisers Board has regularly pursued its authority and has not acted arbitrarily, it shall affirm the decision, order, or ruling of the board.” *Id.* § 37:3415.20(B)(2). This is clearly a limited and highly deferential form of review akin to that the Supreme Court found inadequate in *Patrick*. *See also Ticor Title*, 504 U.S. at 638 (where state did not actively supervise ratemaking, “as in *Patrick*, the availability of state judicial review could not fill the void”). The parties’ briefs do not address how the specific judicial review provision in the Board’s governing statute interacts with the more general judicial review procedures set forth in the Louisiana APA, *see* La. Rev. Stat. § 49:964(G).

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But as discussed above, the Louisiana Supreme Court has made it clear that review under the Louisiana APA is “quite limited.” *Allen v. La. State Bd. of Dentistry*, 543 So. 2d at 915.

In sum, the limited and contingent nature of judicial review here makes clear that it cannot qualify as active supervision. Furthermore, in cases that were resolved through settlement, there was not even a potential for judicial review. *See generally* Unangst Aff. ¶ 76 (acknowledging that the Board “has closed formal investigations into alleged violations of La. R.S. 37:3415.15 after the AMC provided a proposal to ensure compliance with federal and Louisiana [customary and reasonable] requirements”).

Conclusion

We conclude that there is no genuine issue for trial as to whether the State actively supervised the Board’s initial promulgation of Rule 31101 and its enforcement of the Rule prior to adoption of the new procedures in 2017. On both issues, Complaint Counsel prevail as a matter of law. Coupled with our determination in Section IV.B that active supervision was a necessary component of the state action defense, our ruling that active supervision was absent is fatal to the Board’s state action claims. We therefore grant partial summary decision in favor of Complaint Counsel as to the Board’s Ninth Affirmative Defense.

Accordingly, **IT IS ORDERED THAT:**

1. Respondent’s Motion to Dismiss Complaint is **DENIED**;
2. Complaint Counsel’s Motion for Partial Summary Decision regarding Respondent’s Third and Ninth Affirmative Defenses is **GRANTED**; and
3. Respondent’s Third and Ninth Affirmative Defenses are hereby **DISMISSED**.

By the Commission.

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IN THE MATTER OF

1-800 CONTACTS, INC.

Docket No. 9372. Order, April 17, 2018

Order rescheduling the oral argument in this Matter

ORDER RESCHEDULING ORAL ARGUMENT

The Respondent has filed its Appeal Brief perfecting its appeal from the Initial Decision in this matter; Counsel for the Complaint have filed their Answering Brief; and the Respondent has filed its Reply Brief. Commission Rule 3.52(b)(2) provides that the Commission ordinarily will schedule an Oral Argument within fifteen days after the date on which the Reply Brief is filed. Commission Rule 3.51(a) provides that the Commission may extend for good cause any of the time periods relating to an appeal of an Initial Decision. On February 26, 2018, the Commission scheduled the Oral Argument in this matter for May 1, 2018. To enable the new Commissioners who are likely to be confirmed in the near future to conduct the Oral Argument on a matter they likely will decide, the Commission has determined to reschedule the Oral Argument in this matter for June 26, 2018, at 2 p.m. in Hearing Room 532 of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Each side will be allotted forty-five minutes to present its argument. Respondents will have the opportunity to open the argument and will be permitted to reserve time for rebuttal. If either side wishes to provide the Commission with a short written or electronic compilation of material to facilitate its presentation during the Oral Argument, any such compilation may contain only public information that is already in the record of the proceeding, and copies must be filed with the Secretary of the Commission and provided to opposing counsel no later than June 19, 2018, at 5 p.m.

By the Commission.

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IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS
BOARD**

Docket No. 9374. Order, April 18, 2018

Order extending the time period to issue the Opinion and Order of the Commission regarding Complaint Counsel's Motion for Partial Summary Decision.

**ORDER EXTENDING TIME FOR ISSUING OPINION AND ORDER
ADDRESSING COMPLAINT COUNSEL'S MOTION FOR PARTIAL
SUMMARY DECISION DISMISSING RESPONDENT'S FOURTH
AFFIRMATIVE DEFENSE**

In order to ensure that it can give full consideration to the issues presented by Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense, the Commission has determined, pursuant to Commission Rules 3.22(a) and 4.3(b), 16 C.F.R. §§ 3.22(a) and 4.3(b), to extend the time period for issuing an opinion and order until April 26, 2018.

IT IS SO ORDERED.

By the Commission.

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IN THE MATTER OF

**OTTO BOCK HEALTHCARE NORTH AMERICA,
INC.**

Docket No. 9378. Order, April 18, 2018

Opinion and Order denying Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense.

OPINION AND ORDER OF THE COMMISSION

By OHLHAUSEN, Acting Chairman:

On December 20, 2017, the Commission issued an administrative complaint alleging that the agreement for Otto Bock HealthCare North America, Inc. ("Otto Bock" or "Respondent") to purchase FIH Group Holdings, LLC ("Freedom") violated Section 5 of the FTC Act, and that consummation of that transaction on September 22, 2017, violated Section 7 of the Clayton Act. According to the Complaint, the agreement and consummated transaction had the effect of substantially reducing competition in the market for microprocessor-controlled prosthetic knees sold to prosthetic clinics in the United States.

In its Answer to the Complaint, *inter alia*, Respondent denied that the merger harmed consumers or competition, Am. Ans. ¶ 57,¹ and asserted affirmative defenses. Respondent's Seventh Affirmative Defense asserts

¹ We use the following abbreviations for purposes of this opinion:

Compl.: Complaint

CCM: Memorandum of Law in Support of Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense

Am. Ans.: Amended Answer and Affirmative Defenses of Respondent Otto Bock Healthcare North America, Inc.

ROpp: Respondent's Opposition to Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense

Shotzbarger Decl.: Declaration of William Shotzbarger (attached to ROpp)

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[REDACTED] Am. Ans. at 30.

At this time, we consider Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense, which was filed pursuant to Commission Rule 3.22(a). *See* 16 C.F.R. § 3.22(a) (permitting motions to strike); *see also* Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense . . ."). Complaint Counsel argue that a [REDACTED] does not affect the legality of the merger agreement between Otto Bock and Freedom or the consummated merger. CCM at 2. According to Complaint Counsel, Respondent's affirmative defense is improper because Respondent cannot prove any set of facts about [REDACTED] that would foreclose liability for possible antitrust violations that occurred when the transaction was completed and Respondent took control of its merger partner. *Id.* at 3. Complaint Counsel seek an order striking Respondent's Seventh Affirmative Defense and precluding Respondent from raising [REDACTED] as a defense to the allegations in the Complaint.

Respondent argues that because [REDACTED], the acquisition will not substantially lessen competition. ROpp at 3-4, 6. Respondent explains that it acquired Freedom on September 22, 2017, and received inquiries about the transaction from the FTC within a week. According to Respondent, [REDACTED]. *Id.* at 4, 5 n.5; Shotzbarger Decl., Exh. C. Respondent also states that it [REDACTED]. ROpp at 4; Shotzbarger Decl., Exh. D [REDACTED]. According to Respondent, whether the acquisition will substantially lessen competition "depends on a forward-looking evaluation," ROpp at

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2, and [REDACTED] the acquisition of Freedom is not likely to result in a substantial lessening of competition. *Id.* at 3.²

For the reasons discussed below, Respondent's averment fails as an affirmative defense. We agree with Complaint Counsel that the averment is not sufficient to negate liability if the allegations in the Complaint are shown. Notwithstanding Respondent's affirmative defense label, the claim can appropriately be viewed as a denial. As Respondent repeatedly explains in its Opposition to the Motion, it asserts this factual issue in arguing that there will be no substantial lessening of competition. Courts typically do not strike negative averments pled as affirmative defenses rather than denials. Consequently, although the claim is not a valid affirmative defense, we will not strike it, and Respondent will remain entitled to develop and produce evidence regarding [REDACTED] as relevant to the claimed likely substantial lessening of competition and to [REDACTED].

² Respondent also contends we should refer this motion to the Administrative Law Judge. Commission Rule 3.22(a) provides, "Motions to dismiss filed before the evidentiary hearing . . . , motions to strike, and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a). The Commission adopted this rule in 2009 "in order to further expedite its adjudicative proceedings, improve the quality of adjudicative decision making, and clarify the respective roles of the Administrative Law Judge ('ALJ') and the Commission in Part 3 proceedings." 73 Fed. Reg. 58,832 (Oct. 7, 2008) (Proposed Rule Amendments); *see also* 74 Fed. Reg. 1804 (Jan. 13, 2009) (Interim Final Rules); 74 Fed. Reg. 20,205 (May 1, 2009) (Amendments Adopted As Final). Since this rule's adoption in 2009, the Commission has consistently ruled upon such motions. *See, e.g., Impax Labs., Inc.*, Docket No. 9373 (F.T.C. Oct. 27, 2017) (Comm'n Op. and Order denying motion for partial summary decision); *1-800 Contacts, Inc.*, Docket No. 9372 (F.T.C. Feb. 1, 2017) (Comm'n Op. and Order granting motion for partial summary decision); *N.C. Bd. of Dental Examiners*, 151 F.T.C. 607 (2011) (Commission's Op. and Order Denying Mot. to Dismiss and Granting Mot. for Partial Summ. Decision). There is no reason to depart from normal Commission practice in this case. Contrary to Respondent's contention, our decision does not determine factual issues that should be developed before the Administrative Law Judge, and there is no reason to refer the motion to him.

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I. Respondent's Averment as an Affirmative Defense

“An affirmative defense is defined as “[a] defendant’s assertion raising new facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all allegations in the complaint are true.” *Saks v. Franklin Covey Co.*, 316 F. 3d 337, 350 (2d Cir. 2003) (quoting *Black’s Law Dictionary* 430 (7th ed. 1999)); *see also Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 449 (1st Cir. 1995) (describing an affirmative defense as “a bar to the right of recovery even if the general complaint were more or less admitted to”) (internal quotation marks omitted); *Drzik v. Haskell Co.*, 2011 WL 2981565, at *1 (M.D. Fla. 2011) (“By definition, an ‘affirmative defense’ is established when a defendant admits to the essential facts of the complaint, but sets forth other facts in justification and/or avoidance.”); *Barnes v. AT&T Pension Ben. Plan-Nonbargained Prog.*, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010) (defining an affirmative defense as “a defense that does not negate the elements of the plaintiff’s claim, but instead precludes liability even if all of the elements of the plaintiff’s claim are proven”) (quoting *Roberge v. Hannah Marine Corp.*, 1997 WL 468330, at *3 (6th Cir. 1997)). Respondent’s Seventh Affirmative defense raises [REDACTED]

[REDACTED] as a new, liability-barring fact. Consequently, in evaluating its sufficiency as an affirmative defense, we inquire whether [REDACTED] would defeat liability even if the Complaint’s allegations are established.

As an initial matter, Respondent’s Seventh Affirmative Defense is speculative: it rests on [REDACTED]

[REDACTED]

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██████████. There are good grounds to reject Respondent's Seventh Affirmative Defense as an affirmative defense even assuming that ██████████

Respondent's Seventh Affirmative Defense rests entirely on ██████████; thus, by its own terms, it rests on the premise that the only appropriate time to consider the likelihood of future anticompetitive effects is ██████████. The challenged merger agreement, however, was entered and the merger was consummated on September 22, 2017. Several months already have passed, and ██████████ cannot eliminate the potential for demonstrating likely anticompetitive effects during the intervening period.

Respondent's Opposition to the Motion to Strike seeks to remedy this deficiency by pointing to ██████████, and by asserting that, after receiving inquiries from the FTC within a week of the merger's consummation, it ██████████. ROpp at 6. Even if these additional considerations were part of the Affirmative Defense,³ however, they still would not suffice to defeat Complaint Counsel's claims if the Complaint's allegations are taken as true. The Complaint alleges that "Otto Bock and Freedom sales personnel no longer have an incentive to compete against each other for sales," Compl. ¶ 57. "Under common

³ Of course, standing alone, the representations about ██████████ do not preclude a finding of likely future anticompetitive effects. As courts and the Commission have repeatedly recognized, a merged firm's choice not to take anticompetitive actions while litigation is pending does not preclude a finding of likely anticompetitive effects. *See, e.g., United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 504-05 (1974) ("If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending. . . . [T]he mere nonoccurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter . . ."); *Polypore Int'l, Inc.*, 150 F.T.C. 586, 599 n.16 (2010).

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ownership and without the incentive to introduce innovations to take and defend sales from each other,” the Complaint continues, “Otto Bock does not have the same incentive to launch these [new] products on the same timeline or in the same form as Otto Bock and Freedom had independently pre-Merger.” Compl. ¶ 58. Nothing in Otto Bock’s Seventh Affirmative Defense or even in its arguments in opposing the Motion to Strike addresses the alleged change in incentives attributable to the consummated merger or the competitive harm that the Complaint alleges followed therefrom.

We find inapposite the cases cited as support for Respondent’s claim that [REDACTED].

All of those cases involved *unconsummated* mergers. Unlike here, the courts in those cases were analyzing the likely competitive harm that would result [REDACTED].

. In those circumstances, the courts ruled,

. *See*

.⁴ Similarly, in

⁴ In each instance the courts’ reasoning was influenced by the fact that [REDACTED]

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██████████⁵ In those cases, unlike this one, the fact that the merger had not been consummated meant that ██████████
 ██████████. Here, where the merger *has* already been consummated, likely anticompetitive effects may arise both ██████████, and the cited holdings have no applicability to the former period.

II. Treating Respondent's Averment as a Denial

Respondent's Opposition repeatedly states that Respondent intends ██████████ to rebut the Complaint's allegation that the merger agreement and consummated transaction had the likely effect of substantially lessening competition. ROpp *passim*. In substance, this is part of Respondent's denial of Complaint Counsel's *prima facie* case, rather than a true affirmative defense. *See, e.g., Drzik*, 2011 WL 2981565, at *1 (stating that a defense that points to a fact that would negate a factor in plaintiff's *prima facie* case "is not an affirmative defense, but a denial"); *Home Mgmt. Sols., Inc. v. Prescient, Inc.*, 2007 WL 2412834, at *3 (S.D. Fla. 2007) (finding that a contention that a challenged joint venture agreement had been modified through subsequent agreements and the course of conduct and dealings was a denial rather than an affirmative defense); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1269 (3d ed. 2017) (discussing improper designation of a "negative averment" as an affirmative defense); *see also In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) ("A defense which points out a defect in the plaintiff's *prima facie* case is not an affirmative defense.").

In these circumstances, Respondent's choice of label as an affirmative defense is not dispositive. Courts typically do not strike such averments. "When a party incorrectly labels a 'negative averment as an affirmative defense rather than as a

⁵ The court noted that the parties were willing to make ██████████
 ██████████.

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specific denial[,] . . . the proper remedy is not [to] strike the claim, but rather to treat it as a specific denial.” *Drzik*, 2011 WL 2981565, at *1 (quoting *Home Mgmt. Solutions*, 2007 WL 2412834, at *3); *Wright & Miller, supra* § 1269, at 557 (“The federal courts have accepted the notion of treating a specific denial that has been improperly denominated as an affirmative defense as though it were correctly labeled.”). Mere choice of label should not prejudice a respondent that has sought to identify a specific element of its defense.⁶ “[R]esearch has not revealed a single reported decision since the promulgation of the federal rules in which an erroneous designation resulted in any substantial prejudice to the pleader.” *Wright & Miller, supra* § 1269, at 557.

Under these circumstances we will not treat Respondent’s Seventh Affirmative Defense as a defense, but only as a denial. As such, this denial regarding [REDACTED] should not be stricken from Respondent’s pleading. To be clear, as discussed above, the averment which composes Respondent’s denial is insufficient in itself to defeat liability. We agree with Complaint Counsel’s analysis on that issue, and the fact that the divestiture remains uncertain reinforces our conclusion. Nonetheless, [REDACTED] could potentially be relevant to rebut a showing of likely anticompetitive effects [REDACTED], and Respondent remains entitled to develop and present relevant evidence regarding [REDACTED]. Moreover, in support of its denial, Respondent may develop and present relevant evidence regarding the [REDACTED] for any violation found. Those factual issues are properly addressed in the hearing before Chief Administrative Law Judge Chappell.

Accordingly,

⁶ Indeed, separate designation of such elements may have benefits by providing useful notice and identifying specific information that should be highlighted and to which respondent has better access. *See Wright & Miller, supra* § 1271, at 603-605.

Interlocutory Orders, Etc.

IT IS ORDERED THAT Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense is **DENIED**.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**OTTO BOCK HEALTHCARE NORTH AMERICA,
INC.**

Docket No. 9378. Order, April 23, 2018

Order granting Complaint Counsel and Respondent's joint motion to reschedule commencement of the evidentiary hearing in this proceeding.

**ORDER GRANTING JOINT MOTION TO RESCHEDULE THE DATE FOR
THE HEARING**

On April 20, 2018, Complaint Counsel and Respondent Otto Bock HealthCare North America, Inc. ("Otto Bock") jointly moved to reschedule commencement of the evidentiary hearing in this proceeding to July 10, 2018. The parties represent that Chief Administrative Law Judge D. Michael Chappell agrees with this scheduling change.

The hearing currently is scheduled to begin on June 1, 2018, which is two weeks after the scheduled start of the evidentiary hearing in *In the Matter of Tronox Limited, et al.*, Docket No. 9377. Both hearings are assigned to Judge Chappell. If *Tronox* goes to trial as scheduled, the hearing in this matter may not be handled expeditiously. In these circumstances, it would be difficult to provide adequate notice to witnesses of the dates when they would be expected to testify and for counsel for each side efficiently to allocate their time and resources.

Consequently, we find that there is good cause to reschedule the hearing date. Accordingly,

IT IS HEREBY ORDERED that the evidentiary hearing in this proceeding shall commence on July 10, 2018, and that pre-hearing deadlines shall be appropriately extended by the Administrative Law Judge.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS
BOARD**

Docket No. 9374. Order, April 24, 2018

Order dealing with multiple issues arising from Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense.

**ORDER SEEKING SUPPLEMENTAL BRIEFING, SCHEDULING ORAL
ARGUMENT, EXTENDING DEADLINE FOR COMMISSION RULING,
AND RESCHEDULING COMMENCEMENT OF EVIDENTIARY HEARING**

On February 5, 2018, Complaint Counsel filed a Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense. That defense avers: "Louisiana Real Estate Appraisers Board has acted in good faith to comply with a federal regulatory mandate." Complaint Counsel argue that the regulatory compliance defense is inapplicable to this proceeding and ask the Commission to rule that the Fourth Affirmative Defense is not a valid defense to the Complaint. Respondent has opposed Complaint Counsel's Motion, and Complaint Counsel have filed a timely Reply in support thereof.

After a careful review of the parties' submissions and the applicable case law, we have determined that supplemental briefing and entertaining oral argument on this Motion would be beneficial. Although both parties should be prepared to present oral argument addressing all issues raised by Complaint Counsel's Motion, we instruct the parties to focus their supplemental briefing and presentations on the following questions:

1. How do the elements of the regulatory compliance defense differ from those applicable to implied immunity from the antitrust laws?
2. What are the consequences of successful application of the regulatory compliance defense? Does successful invocation of the defense universally bar antitrust liability

Interlocutory Orders, Etc.

or can it represent a factor to be considered as part of a rule of reason inquiry?

3. Do any differences between the facts in this proceeding and those in telecommunications litigation, where regulatory compliance considerations have received the most extensive treatment, suggest differences in the availability or application of a federal regulatory compliance defense?
4. How should the extant regulatory compliance case law be read in conjunction with more recent Supreme Court authority establishing the requirements of the state action defense? Can these two strands of case law be successfully harmonized, or are they in conflict today?
5. How would a defense based on “compliance in good faith with . . . state regulation” (Memorandum of Respondent Louisiana Real Estate Appraisers Board in Opposition to Complaint Counsel’s Motion for Partial Summary Decision on Respondent’s Fourth Affirmative Defense at 3) relate to the state action and preemption doctrines?

The Commission has determined to conduct the oral argument on August 13, 2018, at 2:00 p.m. in Hearing Room 532 of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Each side will have 30 minutes to present its argument. Complaint Counsel, as moving party, will have the opportunity to open the argument and may reserve time for rebuttal. The Commission’s deadline for ruling upon the Motion will be extended to September 10, 2018. *See* 16 C.F.R. §§ 3.22(a), 4.3(b). In view of this adjustment of the litigation schedule in this proceeding and the timing of evidentiary hearings already scheduled in other proceedings, the evidentiary hearing in this proceeding, currently set to begin on June 11, 2018, will be rescheduled to open on October 15, 2018.

See 16 C.F.R. §§ 3.11(a)(4), 4.3(b). Accordingly,

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IT IS HEREBY ORDERED that Complaint Counsel will submit a supplemental brief on the questions raised in this order by June 11, 2018. Respondent's brief shall be submitted by June 25, 2018. Any reply brief shall be filed by July 2, 2018;

IT IS FURTHER ORDERED that the Commission will conduct oral argument regarding Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense on August 13, 2018, as specified above;

IT IS FURTHER ORDERED that the Commission's deadline for ruling on Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense is extended to September 10, 2018; and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding before an Administrative Law Judge of the Federal Trade Commission will commence on October 15, 2018, at 10:00 a.m.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**RED VENTURES HOLDCO, LP
AND
BANKRATE, INC.**

Docket No. C-4627. Order, April 25, 2018

Letter approving Red Ventures Holdco, LP's divestiture of the Caring.com Assets to Caring Holding, LLC.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Peter Guryan, Esq.
Simpson Thacher & Bartlett LLP

*Re: In the Matter of Red Ventures Holdco, LP, and Bankrate, Inc.
File No. 171-0196, Docket No. C-4627*

Dear Mr. Guryan:

This letter is in reference to the Application For Commission Approval of Divestiture filed by Red Ventures Holdco, LP ("Red Ventures") and dated March 7, 2018 ("Application"). Pursuant to Paragraph II.A. of the Decision and Order in *FTC File No. 171-0196, Docket No. C-4627*, Red Ventures requests prior Commission approval of its proposal to divest the Caring.com Assets to Caring Holding, LLC.

After consideration of Red Ventures' Application and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Application, and subsequently revised on April 22, 2018. In according its approval, the Commission has relied upon the information submitted and the representations made by Red Ventures in connection with Red Ventures' Application and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**LOUISIANA REAL ESTATE APPRAISERS
BOARD**

Docket No. 9374. Order, April 27, 2018

Order denying respondent's motion for expedited review.

ORDER DENYING MOTION FOR EXPEDITED REVIEW

On April 20, 2018, Respondent Louisiana Real Estate Appraisers Board moved to stay this proceeding pending judicial review by the U.S. Court of Appeals for the Fifth Circuit of the Commission's April 10, 2018, Opinion and Order denying Respondent's Motion to Dismiss Complaint and granting Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's state action defenses ("Motion to Stay"). On the same day Respondent also submitted a Motion for Expedited Review requesting that the Commission rule upon the Motion to Stay on or before May 2, 2018.¹

On April 24, 2018, the Commission issued an Order Seeking Supplemental Briefing, Scheduling Oral Argument, Extending Deadline for Commission Ruling, and Rescheduling Commencement of Evidentiary Hearing. The Order moved the date for commencement of the evidentiary hearing in this proceeding from June 11, 2018, to October 15, 2018. Pre-trial deadlines established with reference to the previous June 11, 2018, hearing date may now be adjusted by the presiding Chief Administrative Law Judge. Respondent predicated its Motion for Expedited Review on the proximity of the start of trial, and the delay of the trial date removes those timing concerns.

On April 26, 2018, the United States Senate voted to confirm five nominees to the Federal Trade Commission, four of whom

¹ Respondent also requested the Commission to direct Complaint Counsel to respond to the Motion to Stay by April 25. Complaint Counsel have already filed an Opposition to the Motion to Stay, so that portion of Respondent's motion for expedition is moot.

Interlocutory Orders, Etc.

are expected to receive their commissions in the coming days. Because the Commission is in the midst of change, it is appropriate to defer a ruling on the Motion to Stay until incoming Commissioners are able to participate. Although the Commission plans to address the Motion to Stay expeditiously, action by May 2, 2018, would not be consistent with the extant circumstances.

Accordingly,

IT IS HEREBY ORDERED that Respondent Louisiana Real Estate Appraisers Board's Motion for Expedited Review is **DENIED**.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

**TRONOX LIMITED,
NATIONAL INDUSTRIALIZATION COMPANY
(TASNEE),
NATIONAL TITANIUM DIOXIDE COMPANY
LIMITED (CRISTAL),
AND
CRISTAL USA INC.**

Docket No. 9377. Order, May 16, 2018

Order denying Tronox Limited and the National Titanium Dioxide Company of the Kingdom of Saudi Arabia's motion to stay the Part 3 evidentiary hearing scheduled to begin on May 18, 2018, and to temporarily withdraw this matter from adjudication "to allow renewed settlement discussions."

**ORDER DENYING RESPONDENTS' MOTION TO STAY AND
TEMPORARILY WITHDRAW THIS MATTER FROM ADJUDICATION**

On May 7, 2018, Tronox Limited ("Tronox") and the National Titanium Dioxide Company of the Kingdom of Saudi Arabia ("Cristal") moved the Commission to stay the Part 3 evidentiary hearing scheduled to begin on May 18, 2018, and to temporarily withdraw this matter from adjudication "to allow renewed settlement discussions." Motion at 2. Tronox and Cristal alternatively ask the Commission to reassess whether to seek a preliminary injunction in federal court in this matter. Motion at 5-6. Complaint Counsel oppose the requested stay and dispute the need for or benefit of seeking a preliminary injunction. For the reasons stated below, the Commission denies the Motion to Stay and Temporarily Withdraw this Matter from Adjudication.

Respondents argue that the Commission has good cause to stay this matter "to afford Respondents the opportunity to renew discussion with the Commission about the pro-competitive nature of this transaction" and to provide for settlement discussions. Motion at 2-3. Respondents explain that if the matter remains in Part 3 adjudication, settlement discussions might violate *ex parte* rules. Motion at 4.

Interlocutory Orders, Etc.

Neither the completion of discovery nor progress regarding settlements with other competition authorities provides good cause to stay this proceeding, withdraw it from Part 3, and restart discussions about whether a complaint was warranted. When the Commission issued its Complaint, it found reason to believe that Tronox and Cristal had executed a merger agreement in violation of Section 5 of the FTC Act, 5 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act. It is now in the public interest that the allegations in the Complaint be resolved expeditiously.

Importantly, Commission rules do not contemplate the actions Respondents seek. Commission Rule 3.25 provides a procedure for the withdrawal of a matter from Part 3 adjudication for the Commission to consider a *specific* settlement proposal after an administrative complaint has been issued. See 16 CFR § 3.25. Rule 3.25 does not provide for the withdrawal of a matter from adjudication for exploratory settlement talks or to allow respondents to renew discussions with Commissioners regarding the merits of a transaction.

Rule 3.25 requires that a motion to withdraw the matter from adjudication “be accompanied by a consent proposal.” 16 CFR § 3.25(b). Respondents do not provide a specific consent proposal; they only contend “recent events are likely to make settlement discussions productive.” Motion at 3. Moreover, the procedures provided by Rule 3.25 make clear that settlement discussions should be with Complaint Counsel, not the Commission.¹ If Respondents believe that “recent events are likely to make settlement discussions productive,” they may engage in settlement discussions with Complaint Counsel.

¹ Rule 3.25(c) provides for a stay and withdrawal from adjudication when a consent agreement accompanying the motion to withdraw has been executed by one or more respondents and by Complaint Counsel and has been approved by the appropriate Bureau Director. It also provides an alternative mechanism to provide a specific proposal to the Commission if the Administrative Law Judge certifies the motion and proposal to the Commission “upon a written determination that there is a reasonable possibility of settlement.” The motion and the Administrative Law Judge’s certification “shall not stay the proceedings before the Administrative Law Judge unless the Commission shall so order.” 16 CFR § 3.25(c).

Interlocutory Orders, Etc.

In the alternative, Respondents ask the Commission to reassess whether to file for a preliminary injunction in federal court. Respondents argue that this would be a “faster and more efficient means to resolve this matter.” Motion at 5. Respondents misunderstand the role of a preliminary injunction in the context of the Commission’s Part 3 adjudicative process. The Commission may seek a preliminary injunction to preserve the status quo, *i.e.*, to prevent consummation of the proposed transaction, until the administrative proceeding on the merits takes place. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726-27 (D.C. Cir. 2001). At present, there is no need for a preliminary injunction action to preserve the status quo.

Accordingly,

IT IS HEREBY ORDERED that Respondents’ Motion to Stay and Temporarily Withdraw this Matter from Adjudication is **DENIED**.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

IMPAX LABORATORIES, INC.

Docket No. 9373. Order, May 31, 2018

Order granting the joint motion to revise the briefing schedule for appeals in this matter.

ORDER REVISING BRIEFING SCHEDULE FOR APPEALS

Complaint Counsel and Respondent have filed a Joint Motion to revise the briefing schedule for appeals in this matter.¹ The parties requested these modest extensions due to the voluminous record and longstanding holiday and travel commitments that would be impacted in the absence of an extension. Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), the Commission has determined, for good cause shown, to grant the Joint Motion. Accordingly,

IT IS ORDERED THAT opening briefs must be filed on or before July 2, 2018, and, if a party files an opening appeal brief by that date, its appeal from the Initial Decision will be treated as having been perfected in accordance with Commission Rule 3.52(b), 16 C.F.R. § 3.52(b);

IT IS FURTHER ORDERED THAT any answering brief must be filed on or before August 10, 2018; and

IT IS FURTHER ORDERED THAT any reply brief must be filed on or before August 24, 2018.

By the Commission.

¹ At the time of the Joint Motion, only Complaint Counsel had filed a Notice of Appeal. Subsequently, Respondent filed a Notice of Cross-Appeal.

Interlocutory Orders, Etc.

IN THE MATTER OF

**ALIMENTATION COUCHE-TARD INC.
AND
CROSSAMERICA PARTNERS LP**

Docket No. C-4631. Order, June 5, 2018

Letter approving the divestiture of certain retail fuel assets to Marketplace Development LLC.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

David Gelfand
Cleary Gottlieb Steen & Hamilton LLP

*Re: In the Matter of Alimentation Couche-Tard Inc. and
CrossAmerica Partners LP Docket No. C-4631*

Dear Mr. Gelfand:

This is in reference to the petition for approval of the proposed divestiture of certain assets filed by Alimentation Couche-Tard Inc. and CrossAmerica Partners LP (collectively “ACT”) and received on March 12, 2018 (“Petition”). Pursuant to the Decision and Order in Docket No. C-4631, ACT requests prior Commission approval of its proposal to divest certain retail fuel assets to Marketplace Development LLC (“Marketplace”).

After consideration of ACT’s Petition and other available information, the Commission has determined to approve the proposed divestiture to Marketplace as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by ACT and Marketplace in connection with the Petition and has assumed them to be accurate and complete.

By direction of the Commission.

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IN THE MATTER OF**LOUISIANA REAL ESTATE APPRAISERS
BOARD***Docket No. 9374. Order, June 6, 2018*

Order denying respondent's motion to stay proceedings pending review by the United States Court of Appeals for the Fifth Circuit.

ORDER DENYING STAY PENDING APPELLATE REVIEW

On April 10, 2018, the Commission issued an Opinion and Order denying Respondent's Motion to Dismiss Complaint and granting Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's state action defenses ("April 10 Order"). Respondent filed a Petition for Review of the April 10 Order with the United States Court of Appeals for the Fifth Circuit and submitted to the Commission a Motion to Stay Proceedings Pending Appellate Review ("Motion to Stay").¹

The administrative proceeding that Respondent seeks to stay involves allegations that the Louisiana Real Estate Appraisers Board ("the Board") violated Section 5 of the Federal Trade Commission Act by unlawfully restraining price competition for real estate appraisal services. The adjudication has now proceeded through the close of most discovery and the exchange of witness lists, most exhibits, and expert reports. The evidentiary hearing is scheduled to begin on October 15, 2018.

Respondent argues that a stay is appropriate to protect Louisiana's sovereign interests because the Board is immune from suit under the state action doctrine, and that immunity is lost if the Board must go through trial. Complaint Counsel oppose the Motion for Stay. They argue Respondent neither is entitled to interlocutory appellate review of the Commission's April 10 Order, nor has shown good cause to stay the proceeding.

¹ Respondent subsequently moved for leave to file a reply in support of its Motion to Stay. The Commission grants the requested leave and has considered the contents of Respondent's Reply.

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Commission Rule of Practice 3.41(f)(1), 16 C.F.R. § 3.41(f)(1), states, in relevant part:

The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding: (i) Unless a court of competent jurisdiction, or the Commission for good cause, so directs

For the reasons explained below, the Commission does not find good cause to stay this proceeding.

Respondent's briefing in support of its Motion to Stay offers no good cause to stay this proceeding, and no reason why the Commission's April 10 Order should be overturned.² Respondent has not argued the state action issues – upon which its claim of immunity from suit relies – were wrongly decided. The Commission's April 10 Order comprehensively addressed applicability of the state action doctrine to this proceeding. That Order rejected Respondent's state action defenses as well as a mootness claim predicated on the state action doctrine. The Commission found that, to satisfy the state action defense, Respondent needed to demonstrate the State of Louisiana actively supervised its allegedly anticompetitive conduct. The Commission held there was no genuine dispute of fact that the Board's allegedly anticompetitive conduct was not actively supervised prior to revocation of its governing rule in 2017. Further, the Commission found the evidence the Board proffered was insufficient to show that the State of Louisiana actively supervised reissuance of that rule in 2017 or that it would actively supervise enforcement proceedings under the rule in the future. Respondent's briefing does not identify purported failures in the Commission's findings or reasoning.

² Beyond this, the Commission has long taken the position that the state action defense does not confer immunity from suit and that rulings denying the state action defense do not give rise to an immediate right to interlocutory appeal. *See, e.g., S. C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006); Brief for the United States and the Federal Trade Commission as Amici Curiae, *Teladoc, Inc. v. Texas Med. Bd.*, No 16-50017 (5th Cir. Sept. 9, 2016).

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Respondent's other contention – that a stay would avoid potentially unnecessary litigation expenses – is not persuasive. As noted above, discovery and other pretrial proceedings have almost finished, and their expenses have already been borne. A stay would stop the progress of this litigation just before it reaches its culmination. Under these circumstances, the general maxim – that routine expenses of litigation are insufficient grounds for staying proceedings³ – applies.

The public interest supports denying a stay to avoid what may be ongoing anticompetitive conduct. The Complaint alleges that, through issuance and enforcement of its Rule 31101, the Board has prohibited appraisal management companies from arriving at real estate appraisal fees through the operation of the free market and that it has enforced the Rule in a way that tends to raise prices paid by appraisal management companies for real estate appraisal services. Complaint ¶¶ 3, 44. In the April 10 Order, the Commission found a controlling number of Board members were Board-licensed real estate appraisers. If the Complaint's allegations are substantiated, a Board controlled by real estate appraisers has been regulating appraisals in a manner that tends to raise appraisal fees. Until these allegations are resolved, the Board could continue to act in a manner that may be found anticompetitive. Accordingly, granting a stay could undermine the public interest in maintaining competition.

The public interest also favors the expeditious resolution of the Commission's complaints. *Cf.* Commission Rule of Practice 3.1, 16 C.F.R. § 3.1 (stating the Commission's policy to conduct its adjudicatory proceedings expeditiously). Commission opinions resolving competition issues provide valuable guidance not only to respondents, but also to third parties in similar circumstances. Here, resolving the Complaint's allegations may have particular utility for other states considering mechanisms to ensure that

³ *Cf.* Order Denying Respondent's Expedited Motion to Stay Part 3 Administrative Proceeding and Move the Evidentiary Hearing Date (Jan 12, 2018) ("Generally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters."). The Commission's January 12 Order addressed Respondent's third request to stay this proceeding. The current Motion to Stay is Respondent's fifth such request.

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lenders and their agents compensate appraisers at “customary and reasonable” rates, given the backdrop of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 1639e(i)(1). A stay could delay substantially such guidance.

Accordingly,

IT IS ORDERED that the Motion of Louisiana Real Estate Appraisers Board to Stay Proceedings Pending Appellate Review is hereby **DENIED**.

By the Commission.

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IN THE MATTER OF

**WILH. WILHELMSSEN HOLDING ASA,
WILHELMSSEN MARITIME SERVICES AS,
RESOLUTE FUND II, L.P.,
DREW MARINE INTERMEDIATE II B.V.,
AND
DREW MARINE GROUP, INC.**

Docket No. 9380. Order, June 13, 2018

Order granting, in part, respondents' Expedited Motion for Continuance of Administrative Hearing.

ORDER GRANTING 30-DAY CONTINUANCE OF THE
ADMINISTRATIVE HEARING

Respondents Wilhelm Wilhelmsen and Wilhelmsen Maritime Services AS (together, "Wilhelmsen") and Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc. have moved to postpone the administrative hearing, which is scheduled to begin on July 24, 2018, until October 22, 2018. Complaint Counsel respond that Respondents have not shown good cause for the requested continuance and consequently oppose the motion.¹

Respondents argue that a parallel action brought by the Federal Trade Commission in federal district court, seeking a preliminary injunction barring Respondents from consummating the proposed transaction pending disposition of this administrative proceeding, will likely obviate the need for an administrative hearing. Wilhelmsen represents that "if the District Court enters a preliminary injunction . . . then Wilhelmsen Maritime Services AS will abandon the transaction without further litigating the administrative hearing." Motion,

¹ On May 30, 2018, Respondents moved for leave to file a reply to Complaint Counsel's opposition filing. That motion is granted. In opposing Respondent's Motion for Leave to File a Reply, Complaint Counsel request leave to file a surreply at some future date. In view of our disposition of the underlying Motion for Continuance, we do not find that a surreply from Complaint Counsel is warranted.

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Exhibit A. Respondents further point out that if the district court denies an injunction, under Commission Rule 3.26, the matter may be stayed or withdrawn from adjudication while the Commission determines whether it wishes to continue with the administrative proceeding. The hearing in district court began on May 29, 2018 and is scheduled to be completed by June 14. Complaint Counsel's Opposition to Respondent's Motion to Stay at 4. Respondents claim that a decision is expected in June or July 2018. Motion for Continuance at 1.

Commission Rule 3.41(f) provides, in relevant part, that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding . . . [u]nless a court of competent jurisdiction, or the Commission . . . so directs." 16 C.F.R. §3.41(f). This rule reflects the Commission's commitment to move forward as expeditiously as possible with administrative hearings on the merits. *See, e.g.*, 16 C.F.R. §§ 3.1, 3.11(b)(4), 3.41, 3.46, 3.51-52. The three-month delay of the long-scheduled administrative hearing requested by Respondents would interfere with the Commission's commitment expeditiously to resolve contested matters, which interference the present circumstances do not warrant.

That is, however, not the only issue presented by the current schedule for this matter. The administrative hearing here is currently scheduled to begin on July 24, 2018, which is two weeks after the start of the evidentiary hearing in *In the Matter of Otto Bock HealthCare North America, Inc.*, Docket No. 9378. Both hearings are assigned to Chief Administrative Law Judge D. Michael Chappell. Under current schedules, the hearings in *Otto Bock* and in this matter are likely to clash. In these circumstances, it would be difficult to provide adequate notice to witnesses of the dates when they would be expected to testify and for counsel for each side to allocate their time and resources efficiently.

Consequently, we find that there is good cause to reschedule the hearing date. Deferring the start of the hearing by thirty days will avoid conflict with the *Otto Bock* hearing and provide additional time for resolution of the district court action collateral to this proceeding. Respondents and/or Complaint Counsel may

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seek a further extension of this continuance based on future circumstances. Accordingly,

IT IS HEREBY ORDERED that Respondent's Expedited Motion for Continuance of Administrative Hearing is **GRANTED IN PART**; and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence on August 23, 2018, and that, unless modified by the Chief Administrative Law Judge, all related pre-hearing deadlines shall be extended by 30 days.

By the Commission.

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IN THE MATTER OF

CORELOGIC, INC.

Docket No. C-4458. Order, June 14, 2018

Order to Show Cause and Order modifying the Order so that it is better able to achieve its stated purpose.

ORDER TO SHOW CAUSE AND ORDER MODIFYING ORDER

Pursuant to Commission Rule of Practice 3.72(b), the Commission issues this Order to Show Cause stating the changes the Commission proposes to make to the Decision and Order (“Order”) issued in this matter and the reasons the Commission deems these changes necessary. 16 C.F.R. §3.72(b).

The Commission issued the Order in May 2014 to resolve concerns regarding the competitive impact of the acquisition by CoreLogic, Inc. (“CoreLogic” or “Respondent”) of certain assets from TPG VI Ontario 1 AIV L.P. (“TPG”). Through the acquisition, Respondent acquired TPG subsidiary, DataQuick Information Systems, Inc. (“DataQuick”). Among other things, DataQuick licensed to customers nationwide, real property data known as assessor and recorder data. The Complaint alleged that the acquisition would significantly increase concentration in the market for national assessor and recorder data (“bulk data”). CoreLogic denied the Commission’s allegation but agreed to settle the matter through entry of the Order requiring divestiture of certain DataQuick assets. The Order became final on May 20, 2014.

The Order’s central requirement is that CoreLogic provide Commission-approved Acquirer Renwood RealtyTrac LLC (“RealtyTrac”) with bulk data and certain ancillary data marketed by DataQuick (collectively “licensed data”). Prior to the acquisition, DataQuick licensed the majority of its bulk data from CoreLogic. The Order requires that CoreLogic license and deliver bulk data to RealtyTrac and provide RealtyTrac with the same service, timeliness and quality as CoreLogic provided DataQuick. CoreLogic is further required to provide RealtyTrac with updated bulk data of the same scope and quality as

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DataQuick used in its business for at least 5 years. The Order requires CoreLogic to provide DataQuick's existing licensed data and begin providing updated bulk data within 60 days of executing the Remedial Agreement. CoreLogic and RealtyTrac executed the Remedial Agreement on March 26, 2014 and sixty days after that date is May 25, 2014.

The Order also contains a number of provisions typically found in divestiture orders that ensure RealtyTrac has the information and assistance necessary to become a successful entrant. First, CoreLogic is required to provide RealtyTrac with DataQuick business records. Second, CoreLogic must provide RealtyTrac with access to knowledgeable employees and information related to "DataQuick's collection, manipulation, storage and provision" of data. Third, CoreLogic must allow certain legacy DataQuick customers to terminate their DataQuick contracts in order to do business with RealtyTrac, and, during a period lasting until nine months after the Divestiture Date, include a six month termination clause in all new agreements with former DataQuick bulk data customers. Fourth, the Order requires CoreLogic to facilitate RealtyTrac's ability to hire experienced DataQuick employees. Finally, the Order appoints Mr. Mitchell S. Pettit as monitor to oversee CoreLogic's compliance with the Order.

As required by Commission Rule 2.32, CoreLogic executed an Agreement Containing Consent Order ("Consent Agreement") consenting to entry of the Order. In the Consent Agreement, CoreLogic represented and warranted that it could fulfill the terms of, and accomplish the full relief contemplated by, the Order. Further, in April 2014, CoreLogic submitted its first verified report of compliance under the Order. In this report, Respondent asserted that it was delivering to RealtyTrac all bulk data required by the Order.

Nevertheless, soon after CoreLogic began delivering bulk data to RealtyTrac, RealtyTrac discovered that the deliveries were missing certain required data. RealtyTrac continued to uncover additional missing data for at least the next 2 years. CoreLogic responded to RealtyTrac requests for missing data but did not identify the full scope of bulk data that DataQuick had used.

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Further, CoreLogic did not take adequate steps to ensure it was providing all of the required data to RealtyTrac. In addition, CoreLogic did not provide RealtyTrac, Commission staff, or the monitor with complete and accurate information regarding the manner in which DataQuick provided bulk data to customers.

CoreLogic also failed to deliver to RealtyTrac certain required data that DataQuick licensed from third parties. This data was included in the scope of licensed data in the Order and by signing the consent agreement CoreLogic represented it could provide this data to RealtyTrac. However, CoreLogic subsequently informed Commission staff that it could not produce certain existing bulk data and ancillary data because of limitations on its right to sublicense the data. CoreLogic offered to provide information and introductions to enable RealtyTrac to attempt to license the data directly. Although useful, this offer is not sufficient to comply with the Order because it does not guarantee access to the required data and requires RealtyTrac to expend resources not contemplated by the Order.

It further appears that CoreLogic did not provide the full level of support required by the Order. One example of this concerns an ancillary product, known as an AVM, which CoreLogic provided to RealtyTrac pursuant to the Order. In 2015, CoreLogic ceased standard third party testing of the AVM without informing RealtyTrac. RealtyTrac subsequently discovered a serious technical issue with the product that CoreLogic did not discover through internal quality control processes. The issue was resolved and third party testing resumed.

In February 2015, the Monitor hired a Technical Assistant who helped the Monitor develop and recommend a technical plan to (i) identify the data that CoreLogic was required to provide under the Order, (ii) provide all missing data and information to RealtyTrac, and (iii) verify that the required data and information had been provided. The parties are implementing this technical plan and are in the final stages of verifying that CoreLogic is providing all data and information necessary to duplicate DataQuick's bulk data offerings to customers. CoreLogic will

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thereafter complete transfer of all required information regarding DataQuick's bulk data business.

CoreLogic's actions violated the Order and interfered with its remedial goals. CoreLogic slowed RealtyTrac's acquisition of the full scope of DataQuick bulk data and the information necessary to provide data in the same manner as DataQuick. Further, RealtyTrac appears to have relied on CoreLogic's assertions regarding the scope of DataQuick data that CoreLogic was delivering. This reliance harmed RealtyTrac's reputation and required that it expend technical and financial resources to uncover missing data and redress the effects of CoreLogic's order violations.

In light of the foregoing, the Commission proposes to modify the Order so that it is better able to achieve its stated purpose. The modifications require, among other things, CoreLogic to extend the initial licensing term and comply with a technical transfer addendum and a service level addendum. The addenda contain clearly defined obligations that promote the remedial purpose of the order. CoreLogic is also required to provide technical assistance for one year after the technology transfer to RealtyTrac is complete. In addition, CoreLogic and RealtyTrac have agreed to modify their license agreement to conform to these modifications. The Order incorporates the license agreement as a Remedial Agreement. As required by the Order, CoreLogic seeks permission to implement the agreed modifications to the Remedial Agreement.

Respondent denies that it has violated the terms of the Order and does not agree with the facts and conclusions as stated in the Order to Show Cause. However, in settlement of the Commission's claims regarding violation of the Order as described, Respondent consents to issuance of an Order Modifying Order, and waives any further rights it may have under Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. §3.72(b). Respondent, its attorney, and counsel for the Commission executed an Agreement Containing Order to Show Cause and Order Modifying Order ("Modification Agreement"). The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and

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consideration of public comments. Now, in conformity with Rule §3.72(b) the Commission determines in its discretion that it is in the public interest to modify the Order in Docket No. C-4458.

Accordingly,

IT IS ORDERED that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that **Paragraph II.F** of the Order in Docket No. C-4458 is revised to read as follows (revisions underlined):

- F. Continuing until one year after completion of paragraphs 1 to 10 of Technical Transfer Plan, Respondent shall, upon reasonable request, provide the Acquirer with access to knowledgeable employees and information related to DataQuick's collection, manipulation, storage and provision of Assessor Data, Recorder Data and Other Related Data as needed to assist the Acquirer in collecting, manipulating, storing and providing to customers the Licensed Data and Licensed Historical Data as required by the Order and the Remedial Agreement. As part of this obligation, Respondent shall, on or before the day the Remedial Agreement is executed, designate one or more employees as transition coordinator(s) and shall provide the name and contact information for the transition coordinator(s) to the Acquirer, to the Commission and the Monitor. The transition coordinator(s) shall be responsible for ensuring Respondent complies with its obligations to provide transition assistance as required by this Paragraph and the Remedial Agreement, including by timely providing knowledgeable employees and information to the Acquirer. Respondent shall ensure that the transition coordinator(s) has the authority, capability and resources necessary to meet Respondent's obligations under this paragraph and the Remedial Agreement.

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IT IS FURTHER ORDERED that **Paragraph II.G** of the Order in Docket No. C-4458 is revised to read as follows (revisions underlined):

- G. In any agreement to provide a DataQuick Customer with Assessor Data or Recorder Data that Respondent executes less than 9 months after completing paragraphs 1 to 6 of the Technical Transfer Plan, Respondent shall include a provision allowing the customer to terminate the agreement in order to license or purchase Assessor Data or Recorder Data from the Acquirer so long as the DataQuick Customer provides 180-days' written notice of its intent to terminate the agreement, *provided, however*, that the DataQuick Customer may, at any time after providing its written termination notice, revoke or postpone the effective date of such notice.

IT IS FURTHER ORDERED that **Paragraph VI.A.1** of the Order in Docket No. C-4458 is revised to read as follows (revisions underlined):

- A. Respondent shall submit to the Commission and any Monitor appointed by the Commission:
1. Verified written reports:
 - a. Within 30 days after the date this Order becomes final and every 90 days thereafter until completion of paragraphs 1 to 10 of the Technical Transfer Plan;
 - b. On the first anniversary of the date on which this Order becomes final, and annually thereafter until one year after termination of the Remedial Agreement,

which reports shall set forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and the Remedial Agreement since the filing of any

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previous compliance report, and shall, *inter alia*, describe the status of any transition project plan in a Remedial Agreement, and identify all DataQuick Customers who have provided notice of termination pursuant to Paragraph II above, when such customer provided notice of termination and whether the relevant contract has been terminated; and

IT IS FURTHER ORDERED that the Order in Docket No. C-4458 is amended to include the following **Paragraph IX**:

IX.

IT IS FURTHER ORDERED that:

- A. As used in the Order and Modifying Order the following definitions shall apply:
1. “AVM” means Automated Valuation Model.
 2. “AVM Resale Agreement” means an agreement to resell the following automated valuation models (“AVMs”) owned by CoreLogic: PASS®, ValuePoint®4 (VP4), Prospector™, GeoAVM Core™, and GeoAVM Core Precision™ that conforms in substance to the form agreement attached to the Modifying Order as Confidential Addendum C.
 3. “DataQuick Architecture” means the architecture for the DataQuick Fulfillment Platform. A diagram of the DataQuick Architecture as of the entry of the Modifying Order is attached as Confidential Addendum D.
 4. “DataQuick AVM” means an automated valuation model that CoreLogic obtained from DataQuick.

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5. “DataQuick Fulfillment Platform” shall have the meaning defined in the Technical Transfer Plan.
 6. “First Amendment to the CoreLogic-RealtyTrac Agreement,” means Amendment 1 to the Data License Agreement and Statement of Work between CoreLogic Solutions, LLC. (“CoreLogic”) and Attom Data Solutions (“Customer”).
 7. “Independent AVM Testing” means testing of the AVM by AVMetrics, LLC (or another recognized independent third party AVM testing company selected by CoreLogic and consented to in writing by the Acquirer) using national benchmark sales values to determine accuracy (unless otherwise agreed to by the Acquirer after entry of the Modifying Order).
 8. “Service Level Addendum” means the Service Level Addendum attached to the Modifying Order as Confidential Addendum A.
 9. “Technical Transfer Plan” means the Technical Transfer Plan attached to the Modifying Order as Confidential Addendum B.
- B. The Commission approves the First Amendment to the CoreLogic-RealtyTrac Agreement and incorporates it into the Order as part of the Remedial Agreement.
 - C. Respondent shall extend the initial license term of the Remedial Agreement for 3 years in accordance with the terms of the First Amendment to the CoreLogic-RealtyTrac Agreement.
 - D. Respondent shall comply with the requirements of the Service Level Addendum.
 - E. Respondent shall comply with the requirements of the Technical Transfer Plan.

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- F. Within ten days of receiving a written request by the Acquirer, Respondent shall enter an AVM Resale Agreement with the Acquirer.
- G. So long as Acquirer is marketing, offering, selling or supplying a DataQuick AVM to customers, Respondent shall comply with the terms of Paragraph K of the Service Level Agreement. Respondent shall bear the cost of providing Independent AVM Testing required by paragraph K of the Service Level Addendum.
- H. Respondent shall not modify the DataQuick Architecture without providing at least 60 days' written notice to the Monitor and the staff of the Commission explaining the reason for the modification and providing a diagram of the revised DataQuick Architecture, which diagram shall be incorporated into Confidential Addendum D of the Modifying Order.
- I. The purpose of the Modifying Order is to resolve the matters described in the Order to Show Cause that occurred before Respondent executed the Modification Agreement.

By the Commission.

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IN THE MATTER OF

**ALIMENTATION COUCHE-TARD INC.
AND
CROSSAMERICA PARTNERS LP***Docket No. C-4631. Order, June 18, 2018*

Letter approving the divestiture of certain retail fuel assets to Marketplace Development LLC and to divest a third retail station and related retail fuel assets to PPBB LLC.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

David Gelfand, Esq.
Cleary Gottlieb Steen & Hamilton LLP

*Re: In the Matter of Alimentation Couche-Tard Inc. and
CrossAmerica Partners LP Docket No. C-4631*

Dear Mr. Gelfand:

This is in further reference to the Petition for the approval of the proposed divestiture of certain assets filed by Alimentation Couche-Tard Inc. and CrossAmerica Partners LP (collectively “ACT”) and received on March 12, 2018 (“Petition”). In that Petition, pursuant to the Decision and Order in Docket No. C-4631, ACT requested prior Commission approval of its proposal to divest two retail fuel stations and related retail fuel assets to Marketplace Development LLC (“Marketplace”), and to divest a third retail station and related retail fuel assets to PPBB LLC (“PPBB”).

On June 5, 2018, the Commission approved the proposed divestiture to Marketplace, as set forth in the Petition. After consideration of ACT’s Petition and other available information, the Commission has now determined to approve the proposed divestiture to PPBB, as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by ACT and PPBB in connection with the Petition, and has assumed them to be accurate and complete.

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By direction of the Commission.

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IN THE MATTER OF

IMPAX LABORATORIES, INC.*Docket No. 9373. Order, June 27, 2018*

Order granting Complaint Counsel's Motion to Dismiss Respondent's Notice of Cross-Appeal and scheduling briefing.

ORDER OF THE COMMISSION

On May 11, 2018, Chief Administrative Law Judge D. Michael Chappell issued an Initial Decision concluding that the evidence adduced in this proceeding failed to prove a violation of Section 5 of the FTC Act and ordering that the Complaint be dismissed. After Complaint Counsel filed a Notice of Appeal, Respondent Impax Laboratories, Inc. (apparently now Impax Laboratories, LLC) filed a Notice of Cross Appeal, stating an intention to cross-appeal "portions of the Initial Decision . . . related to relevant market and market power, as well as any related findings of fact and conclusions of law." Respondent's Notice of Cross Appeal (May 29, 2019). On June 5, 2018, Complaint Counsel moved to Dismiss Respondent's Notice of Cross Appeal.

Complaint Counsel argue that Respondent's cross-appeal is improper because the Initial Decision dismissed the complaint and the cross-appeal seeks only to address alternative grounds for affirming the dismissal. Respondent opposes Complaint Counsel's motion. Respondent argues that Commission Rule 3.52(b)(1), 16 C.F.R. § 3.52(b)(1), which provides that "any party may file objections to the initial decision or order of the Administrative Law Judge" by filing a notice of appeal that "designat[es] the initial decision or order or part thereof appealed from," is not limited to parties that have been found to have violated the FTC Act. Commission Rule 3.52(b)(1), however, does not expressly address the setting where a respondent seeks to appeal an order dismissing the complaint.

The only recent case addressing the application of Rule 3.52(b)(1) was *In the Matter of LabMD, Inc.*, Docket No. 9357, Order (F.T.C. Dec. 18, 2015) ("LabMD Order"). In that case, the

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respondent acknowledged the ALJ's Initial Decision and Order "were both correct and should be affirmed," but nonetheless submitted a conditional, "protective cross-appeal" on issues the ALJ's decision did not address. *Id.* at 2. The respondent argued the cross-appeal was necessary to preserve issues for appeal to a federal court. The Commission disagreed, explaining that rationale would permit "protective cross-appeals" by the successful party in essentially every case – a result "inconsistent with general appellate practice" that "would prove highly burdensome and wasteful for all involved." *LabMD* Order at 2.

Unlike *LabMD*, Respondent's cross-appeal here would challenge an issue on which the ALJ did rule – market definition and market power – albeit in the alternative. The Commission understands the importance of permitting parties to present their arguments on both the facts and the law for the Commission's *de novo* review, especially when, as here, there are numerous issues a Commission decision may (or may not) ultimately address. The parties have proposed an alternative: Increase the word limits in Respondent's answering and Complaint Counsel's reply briefs. The Commission believes this strikes the right balance between those considerations and the ones animating our decision in *LabMD*. While Respondent requested 10,000 additional words, the Commission finds an additional 7,000 words is appropriate. Seven thousand words represents a 50% increase to the normal 14,000 word limit, is consistent with the increase the Commission granted and found effective in *LabMD*, and should easily suffice to discuss the limited issues raised in Respondent's cross-appeal. To avoid any prejudice to Complaint Counsel, the Commission increases the word limit for Complaint Counsel's reply brief by 5,000 words.

Accordingly,

T IS HEREBY ORDERED THAT Complaint Counsel's Motion to Dismiss Respondent's Notice of Cross-Appeal is **GRANTED**;

IT IS FURTHER ORDERED THAT Complaint Counsel's opening brief must be filed on or before July 2, 2018, and, if Complaint Counsel files an opening appeal brief by that date,

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Complaint Counsel's appeal from the Initial Decision will be treated as having been perfected in accordance with Commission Rule 3.52(b), 16 C.F.R. § 3.52(b);

IT IS FURTHER ORDERED THAT while Respondent may not file an opening appeal brief, it may file an answering brief that shall not exceed 21,000 words. Any such answering brief must be filed on or before August 10, 2018; and

IT IS FURTHER ORDERED THAT Complaint Counsel may file a reply brief that shall not exceed 12,000 words. Any such reply brief must be filed on or before August 24, 2018.

By the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

SLAC, INC.

FTC File No. 172 3090 – February 13, 2018

RESPONSE TO SLAC, INC.'S PETITION TO LIMIT OR QUASH CIVIL INVESTIGATIVE DEMAND DATED DECEMBER 6, 2017

By McSWEENEY, Commissioner:

SLAC, Inc. has submitted a petition seeking to limit or quash the Civil Investigative Demand (CID) that the Commission issued on December 6, 2017. For the reasons described below, the petition is denied.

I. BACKGROUND

SLAC sells services to consumers who want to reduce their monthly student loan payments by applying for income-based repayment plans offered through the U.S. Department of Education. In connection with an investigation into whether the business practices of SLAC or other identified individuals, including SLAC's President Adam Owens, violate the FTC Act or the Telemarketing Sales Rule (TSR), the Commission issued a CID seeking information about the company and its business practices.

SLAC objects to two of the CID's specifications. It argues that Interrogatory 10, which asks for a description of "each step the Company takes to ensure that it does not collect payment from consumers until after [its student loan services] have been fully delivered or rendered," is beyond the stated scope of the investigation and therefore the Commission's jurisdiction. It also contends that Document Request 13, which asks for documents related to a presentation given by Mr. Owens at a conference of the Association for Student Loan Relief, is outside the scope of the Commission's investigation and abridges the First

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Amendment rights of both SLAC and Mr. Owens. As explained below, SLAC's objections lack merit.

II. ANALYSIS

A. Applicable legal standards

The power to investigate is vital to the Commission's ability to carry out its congressionally-mandated duty to prevent unfair or deceptive acts or practices.¹ Law enforcement agencies like the Commission "have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."² Administrative compulsory process such as a CID is proper if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the scope of the inquiry.³

Agencies have wide latitude to determine what information is relevant to their law enforcement investigations and are not required to have "a justifiable belief that wrongdoing has actually occurred."⁴ Thus, "[t]he relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution."⁵ The standard of relevance in an investigatory setting "is more relaxed than in an adjudicatory one."⁶ Moreover,

¹ *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (en banc); 15 U.S.C. § 45(a).

² *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

³ *Id.*; *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *Texaco*, 555 F.2d at 874.

⁴ *See, e.g., Morton Salt*, 338 U.S. at 642-43 ("[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.").

⁵ *Texaco*, 555 F.2d at 874.

⁶ *Invention Submission Corp.*, 965 F.2d at 1090; *see also id.* ("At the

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agencies are “free to determine, in the first instance, the scope of their own jurisdiction when issuing investigative subpoenas.”⁷

B. The challenged specifications are within the scope of the Commission’s investigation.

SLAC states that it “does not challenge the FTC’s statutory authority to investigate practices that it believes may constitute deceptive or unfair trade practices when used in the course of trade.”⁸ Rather, it argues that the challenged specifications seek information “wholly unrelated to any purported fraud and deception being investigated.”⁹

Information sought in an administrative subpoena must be “reasonably relevant” to the Commission’s investigation.¹⁰ Here, the Commission described the subject of the investigation in the CID Schedule:

Whether [SLAC], Adam Owens, Scott Brown, Mindy Fincher, and others have engaged in deceptive or otherwise unlawful activity in connection with the marketing, promotion, offering for sale, or sale of student loan debt relief products or services, as defined herein, in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*, or the Telemarketing Sales Rule, 16 C.F.R. Part 310, and whether the Commission action to obtain monetary relief would be in the public interest. See also attached resolution.¹¹

investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint.”).

⁷ *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

⁸ Pet. at 3-4.

⁹ *Id.* at 7.

¹⁰ *Morton Salt*, 338 U.S. at 652.

¹¹ Pet. Exh. A (CID Schedule) at 2.

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SLAC argues that Interrogatory 10 seeks information outside the stated scope of the Commission's investigation because as a student loan document preparation and assistance company, its business is not covered by the TSR.¹² In particular, SLAC argues that it does not offer "debt relief services," as the TSR defines that term.¹³ With regard to Document Request 13, SLAC argues that the specification "exceed[s] the FTC's investigatory power in that it seeks information related to lobbying efforts," and that such efforts are beyond the scope of the Commission's investigation.¹⁴ SLAC argues further that the Commission's request violates the First Amendment rights of free speech and association of both SLAC and company President Owens.¹⁵ Each of SLAC's arguments is addressed below.

1. Interrogatory 10

Interrogatory 10 asks SLAC to describe the steps it takes to ensure "that it does not collect payment from consumers until after [its student loan services] have been fully delivered or rendered." SLAC is correct in stating that the TSR prohibits telemarketers from collecting fees for "debt relief services" before delivering such services.¹⁶ SLAC is incorrect, however, to suppose that the scope of the Commission's investigation is limited by SLAC's assertion that its services do not meet the TSR's definition of "debt relief services."

Whether or not SLAC is selling "debt relief services" as defined by the TSR turns on how the company *represents* its services to consumers. SLAC states that it does not negotiate or settle consumers' debts but instead provides "document preparation services" in connection with the Department of

¹² Pet. at 8.

¹³ *Id.* at 8-11; *see* 16 C.F.R. § 310.2(o) (defining "debt relief service"). *See also* Pet. Exh. A (CID Schedule) at 7 (definition of "Debt relief product or service").

¹⁴ Pet. at 7, 11-13.

¹⁵ *Id.* at 11-13.

¹⁶ *Id.* at 8; *see* 16 C.F.R. § 310.4(a)(5).

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Education's student loan consolidation program.¹⁷ Notwithstanding its own characterization of its business model, if SLAC represents to consumers, directly or by implication, that it will "renegotiate, settle, or in any way alter the terms of payment ... including, but not limited to, a reduction in the balance, interest rate, or fees owed" to a creditor, then it is engaged in the provision of "debt relief services" subject to the TSR.¹⁸ The scope of the Commission's investigation includes not only determining whether SLAC has violated the FTC Act or the TSR in connection with the services it sells, but also whether those services are a "debt relief service" as defined in the TSR. The CID includes other requests seeking materials that will enable the Commission to determine how SLAC represented its services to consumers,¹⁹ and if they meet the TSR definition in question. Therefore, the Commission has the "legitimate right" to satisfy itself "that [SLAC's] behavior is consistent with the law and the public interest,"²⁰ and is entitled to make its own determination as to the nature and legal status of the services SLAC provides.²¹

Moreover, regardless of the legal characterization of the services provided, seeking information regarding the timing of payments relative to the rendering of services is potentially relevant to the issue of monetary relief, should the Commission determine that a law violation has occurred.

¹⁷ Pet. at 8-11.

¹⁸ 16 CFR § 310.2(o).

¹⁹ See, e.g., Pet. Exh. A (CID Schedule) at 5 (Document Request 3 seeking copies of advertisements, and Document Request 5 seeking copies of sales scripts).

²⁰ *Morton Salt*, 338 U.S. at 652.

²¹ We also note that at least one court has rejected arguments similar to the ones raised by SLAC here. In *CFPB v. Irvine WebWorks, Inc.*, the defendants argued that their services were simply assisting consumers in consolidating their loans with the Department of Education and therefore did not constitute a "debt relief service" under the TSR. 2016 U.S. Dist. LEXIS 36097, at *19 (C.D. Cal. Feb. 5, 2016). The court rejected this position, however, explaining that the TSR defined "debt relief services" in "broad terms" that covered "entities that engage in practices substantially similar to those of loan consolidation middlemen." *Id.* at 18.

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Therefore, Interrogatory 10 is directly relevant to the stated purpose of the investigation. SLAC's argument that it need not respond to this interrogatory because it does not offer "debt relief services" is therefore without merit. We find no reason to limit or quash the CID's request for information in Interrogatory 10.

2. Document Request 13

Document Request 13 directs SLAC to produce notes and other materials relating to a presentation by its president at the annual conference of the Association for Student Loan Relief: "An Industry Under Fire by Regulators and What Can Be Done To Help Save Our Businesses!" SLAC argues that the materials requested are outside the scope of the Commission's investigation because, it claims, the presentation involved efforts to organize lobbying activities for the student loan relief industry. SLAC argues that the request is "an unlawful attempt to censor Mr. Owens' and SLAC's First Amendment rights."²² These arguments are unfounded.

First, SLAC asserts that "[l]obbying efforts and a presentation made related to those efforts clearly fall outside the Scope of the CID."²³ But even assuming that the presentation related to lobbying efforts,²⁴ it does not follow that materials related to the presentation fall outside the scope of the investigation. Indeed, one reason businesses might decide to lobby for a change in the law could be that they believe their current practices are illegal. In such a case, the presentation could well contain relevant facts about both the practices and the presenter's knowledge that such practices are unlawful. Here, such facts would be relevant to the purpose of the Commission's investigation because Mr. Owens's conduct—and thus his knowledge of any illegality—is also a subject of the investigation. Accordingly, SLAC's assertion that Mr. Owens's presentation related to lobbying efforts does not

²² Pet. at 11-13.

²³ *Id.* at 4; *see also id.* at 12-13.

²⁴ SLAC does not offer any factual support for this assertion.

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show that the materials requested by the specification are outside the scope of the investigation.

Second, SLAC argues that by requesting information about the presentation, the Commission is “trying to bully or intimidate” SLAC, and is asking for information “as a way to silence those speaking out.”²⁵ SLAC further suggests that the CID is “an unlawful attempt to censor” SLAC and its President.²⁶ There is no basis for these claims.

To justify noncompliance with an administrative request for information such as the Commission’s CID, the recipient must make “a prima facie showing of arguable first amendment infringement.”²⁷ That showing requires “objective and articulable facts, which go beyond broad allegations or subjective fears.”²⁸ The recipient must show both “a causal link between the disclosure and the prospective harm” to its First Amendment rights and “adverse consequences” that could reasonably flow from the disclosure.²⁹

SLAC’s First Amendment claims are based on the following allegations:

- 1) an executive of the Missouri Higher Education Loan Authority attended Mr. Owens’s presentation;
- 2) the Authority services student loan debt and therefore stands to lose money if students enroll in repayment plans;
- 3) the Authority services debt for the U.S. Department of Education; and

²⁵ Pet. at 4.

²⁶ *Id.* at 13.

²⁷ *Brock v. Local 375, Plumbers Int’l Union*, 860 F.2d 346, 349 (9th Cir. 1988).

²⁸ *Id.* at 350 n.1.

²⁹ *Dole v. Local Union 375, Plumbers Int’l Union*, 921 F.2d 969, 972 (9th Cir. 1990)

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- 4) the executive later told the president of the conference sponsor that he intended to meet with the Commission and the Consumer Financial Protection Bureau to discuss the student loan industry.³⁰

SLAC concludes from these allegations that the executive was an “undisclosed agent of the federal government” who (presumably through the Commission) is “penalizing SLAC and Mr. Owens” for exercising their free speech rights and “bullying the industry to cease all efforts to lobby legislators.”³¹

SLAC’s allegations are not “objective and articulable facts” that demonstrate an arguable First Amendment violation.³² Even assuming SLAC’s averments are accurate, SLAC has not shown how producing information about the presentation would bully, censor, or intimidate SLAC or Mr. Owens. Indeed, SLAC does not describe any harm to its speech or association rights beyond broad, conclusory allegations and subjective fears. Nor has SLAC identified any consequences that could flow from producing the requested materials. The petition thus provides no reason to limit or quash the request for documents regarding Mr. Owens’s presentation.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition to Limit or Quash Civil Investigative Demand filed by SLAC be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT all responses to the specifications in the Civil Investigative Demand to SLAC must now be produced on or before March 6, 2018.

By the Commission.

³⁰ Pet. at 2-3.

³¹ *Id.*

³² *Brock*, 860 F.2d at 349.

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NORDIC CLINICAL, INC.
AND
ENCORE PLUS SOLUTIONS, INC.

FTC File Nos. 172 3132 & 172 3143 – Decision, March 12, 2018

RESPONSE TO NORDIC CLINICAL, INC. AND ENCORE PLUS SOLUTIONS, INC.’S PETITION TO STAY CIVIL INVESTIGATION AND QUASH CIVIL INVESTIGATIVE DEMANDS DATED DECEMBER 19, 2017

By McSWEENY, Commissioner:

Nordic Clinical, Inc. and Encore Plus Solutions, Inc. have filed a Petition seeking to stay a Federal Trade Commission investigation, and to quash two Civil Investigative Demands for Oral Testimony (“CIDs”) issued on December 19, 2017. Because replacement CIDs have now been issued, the Petition is therefore moot. Accordingly,

IT IS ORDERED THAT the Petition By Nordic Clinical, Inc. and Encore Plus Solutions, Inc. To Stay Investigation and Quash Civil Investigative Demands be, and it hereby is, **DENIED** as moot.

By the Commission.

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NORDIC CLINICAL, INC.
AND
ENCORE PLUS SOLUTIONS, INC.*FTC File Nos. 172 3132 & 172 3143 – Decision, March 12, 2018***RESPONSE TO NORDIC CLINICAL, INC. AND ENCORE PLUS SOLUTIONS, INC.’S PETITION TO STAY CIVIL INVESTIGATION AND QUASH CIVIL INVESTIGATIVE DEMANDS DATED DECEMBER 19, 2017****By McSWEENY, Commissioner:**

Nordic Clinical, Inc. (“Nordic Clinical”) and Encore Plus Solutions, Inc. (“Encore Plus”) have petitioned to (1) stay two Commission investigations; and (2) quash two civil investigative demands (“CIDs”) for corporate testimony pending resolution of related criminal investigations. For the reasons stated below, the petition is denied.

I. BACKGROUND

Nordic Clinical is a Delaware corporation owned by two Canadian citizens, Vito Proietti and Vincent DiCriscio. Encore Plus is a Florida corporation owned by Mr. Proietti. The companies are direct mail marketers of nutritional supplements that they claim treat a number of age-related health conditions. Although the companies now contend they principally conduct business in Montreal, Canada, Nordic Clinical responded to an earlier CID interrogatory that its principal address is in Fort Lauderdale, Florida, and Encore Plus likewise acknowledged that its principal address is in Miami, Florida.

In Spring 2017, the Commission began investigating the companies’ marketing claims. Nordic Clinical markets its Neurocet product as an extremely strong and long-lasting pain reliever. Encore Plus sells two substantively identical products under the names Regenify and Resetigen-D, which it markets as pain relievers, memory enhancers, and treatments to reverse age-related health problems. The investigations are intended to determine whether the companies have “made false or

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unsubstantiated representations about the health-related benefits” of their products in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52, and whether Commission action to obtain monetary relief for injured consumers is in the public interest. Pet. Exhs. A, B.

On June 15, 2017, the Commission issued CIDs to both companies seeking corporate documents and information regarding, among other things, corporate location, officers and owners, marketing claims, consumer complaints, sales and refunds, and the identities of affiliated entities.¹ The companies produced documents and responded to interrogatory requests in August 2017, and Nordic Clinical produced additional responsive documents in December 2017.

As part of its continuing investigations, on March 9, 2018, the Commission issued CIDs to both companies for oral testimony. Pet. Exhs. A, B. The CIDs seek testimony on a range of topics, including: the companies’ responses to the June 2017 CIDs; their business structure; sales and refunds; consumer complaints; endorsements and testimonials; product manufacturing, substantiation, and marketing; and their relationship with affiliated companies and individuals. The CIDs also ask about the roles of Proietti and DiCriscio at the companies, as well as their background, training, and experience. Pet. Exh. A at 2-3, Pet. Exh. B at 2-3. The CIDs require the companies to designate persons who could “testify on [their] behalf” at an investigational hearing in Fort Lauderdale, Florida “about information known or reasonably available to the” companies. Pet. Exh. A at 1-2 (citing 16 C.F.R. § 2.7(h)), Pet. Exh. B at 2 (same).

On April 3, 2018, the companies filed a petition asking the Commission to stay its investigations and temporarily quash the CIDs until criminal investigations purportedly involving their products are resolved. The companies claim there are “at least

¹ The CIDs were issued under Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, and were authorized by an August 13, 2009, Commission Resolution, permitting the use of compulsory process in agency investigations into possible false advertising or marketing claims for dietary supplements, foods, or drugs.

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three separate criminal investigations related to the nutritional supplements identified in the CIDs.” Pet. 2. They support their claim with (1) a search warrant issued by an Idaho court in September 2017 for products located at a facility in Nampa, Idaho; (2) a motion filed by Nordic seeking the return of property seized from the Idaho facility and pleadings related to that motion; and (3) two December 2017 Canadian search warrants for products at two locations in Montreal. Pet. Exhs. C, D, E, F, G.

Petitioners argue the CIDs demand information about Proietti and DiCriscio that is unrelated to the FTC’s investigation, but instead is “obviously designed to glean information for criminal charges against” them. Pet. 5. According to petitioners, compelling such testimony would violate the Fifth Amendment right against self-incrimination, although it is less than clear whether they mean their own or that of Proietti and DiCriscio. Pet. 7-9. The companies assert a stay is necessary in order to “assure that Fifth Amendment rights are not compromised.” Pet. 10. Finally, the companies contend the CIDs cannot require their Canadian owners to testify in Florida.

For the reasons stated below, we deny the petition.

II. ANALYSIS

A. The requested testimony is not covered by the Fifth Amendment

The CIDs are directed to two companies—Nordic Clinical and Encore Plus—not to Messrs. Proietti and DiCriscio personally. Pet. Exhs. A, B. The companies have no Fifth Amendment rights against self-incrimination and must designate a representative who faces no such risk to testify on their behalf.

When the Commission issues a CID for oral testimony from a corporation or other business entity, “the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify *on its behalf* * * *.” 16 C.F.R. § 2.7(h) (emphasis added). The witnesses appear on

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behalf of the company, not in their individual capacities.² It has long been established that the Fifth Amendment privilege “is a purely personal one,” and that “it cannot be utilized by or on behalf of any organization, such as a corporation.” *United States v. White*, 322 U.S. 694, 699 (1944); *see also Bellis v. United States*, 417 U.S. 85, 89-90 (1974) (“the privilege against compulsory self-incrimination should be ‘limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.’”) (citing *White*, 322 U.S. at 701).

Petitioners nonetheless maintain that the CIDs, issued “in the midst of ongoing criminal investigations, * * * seek[] to compel testimony about” Proietti and DiCriscio that implicate their Fifth Amendment rights. Pet. 7-9. This claim fails for several reasons.

First, the companies have provided no evidence that they or Proietti and DiCriscio have a reasonable fear of self-incrimination or face a real threat of a criminal indictment to justify invoking any Fifth Amendment rights. *See United States v. Argomaniz*, 925 F.2d 1349, 1353 (11th Cir. 1991) (the privilege against self-incrimination “applies only in ‘instances where the party has reasonable cause to apprehend danger’ of criminal liability”) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

² The companies are thus in error when they assert the CIDs are directed to Proietti and DiCriscio “in their individual capacities” because, as owners and officers of the companies, they fall within the CID’s definition of the “Company.” Pet. 5, 8. To the contrary, the CIDs are directed only to the companies, although they ask for corporate information that employees or other agents would have about the company. That does not transform the CIDs into requests addressed to Proietti and DiCriscio in their personal capacities. The companies also claim the CID queries focused on Proietti and DiCriscio are irrelevant to the FTC’s investigation and are being asked only to pursue criminal charges against them. Pet. 6. This claim too is unfounded because the companies’ August 2017 CID responses showed that Proietti and DiCriscio, as owners of the companies, played a central role in product development and marketing. Indeed, the companies asserted that Proietti and DiCriscio are not only responsible for product advertising and promotion, but they “conducted their own research,” reviewed relevant literature, and even took the products themselves to determine if the products’ benefits were consistent with their marketing claims. The CID inquiries as to Proietti and DiCriscio are thus directly relevant to our inquiry into whether the companies’ marketing violated the FTC Act.

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The supporting materials provided by the petitioners show, at most, that Nordic Clinical may be the subject of criminal investigations into Neurocet and other products, but there is no indication that the company faces a reasonable danger of criminal liability. The United States District Court for the District of Idaho recognized as much this past February when it denied Nordic Clinical's motion to return seized property. As the court noted, no indictments had been issued and "it is unknown whether the Government will prosecute any person or entity involved in its investigation, including Nordic." *In the Matter of the Search of: Specialty Fulfillment Center*, No. 1:17-mc-09979-CWD, 2018 WL 785861, at *7 (D. Idaho Feb. 8, 2018). Petitioners provide no evidence that Encore Plus faces a threat of a criminal indictment.

Second, even if Proietti or DiCriscio faces a genuine threat of criminal indictment, that would not excuse the companies from compliance with the CID. The companies themselves have no Fifth Amendment privilege as discussed above.³ Even if the two owners are unavailable to testify, the companies still must select an officer, employee, or "agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." *Kordel*, 397 U.S. at 8 (citations omitted); *see generally* 8 Charles Alan Wright, Arthur R. Miller, *et al.*, Federal

³ The companies' reliance on *United States v. Hubbell*, 530 U.S. 27 (2000), Pet. 8, is misplaced. *Hubbell* involved a subpoena issued to the target of a criminal investigation in his individual capacity; the Court did not address the Fifth Amendment status of corporations. As courts have consistently recognized, *Hubbell* did not reverse long-standing Supreme Court precedent that corporations lack Fifth Amendment rights. *See, e.g., In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 263 n.2 (3d Cir. 2015); *Amato v. United States*, 450 F.3d 46, 51 (1st Cir. 2006); *Armstrong v. Guccione*, 470 F.3d 89, 98 (2d Cir. 2006). The companies also get no help from *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which they claim also cast doubt on the inapplicability of the Fifth Amendment to corporations. Pet. 9. Those two cases address the application of the *First* Amendment to corporations. Nothing in them signals any departure from century-old precedents recognizing the *Fifth* Amendment privilege against self-incrimination as an individual right. *See, e.g., Grand Jury*, 786 F.3d at 261 & n.1 ("[W]e discern nothing in Supreme Court jurisprudence that suggests the Court has, in any way, signaled its readiness to depart from its longstanding precedent regarding corporate custodians' inability to invoke the Fifth Amendment privilege against self-incrimination.").

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Practice & Procedure § 2018 (3d ed. 2010) (“[T]he burden on the corporation is to designate someone to answer on its behalf who can furnish as much of the requested information as is available to the corporation without fear of self-incrimination”).⁴

Indeed, the companies cannot resist complying with the CIDs by designating Proietti and DiCriscio as their corporate representatives if the executives will simply assert the Fifth Amendment privilege at the investigational hearings. “In their official capacit[ies],” the executives “have no privilege against self-incrimination.” *White*, 322 U.S. at 699. Further, the Supreme Court has held that a corporation may not designate as its representative an officer who could assert a personal Fifth Amendment privilege and, in this way, “secure for the corporation the benefits of a privilege it does not have.” *United States v. Kordel*, 397 U.S. 1, 8 (1970) (quoting *U.S. v. 3963 Bottles of Enerjol Double Strength*, 265 F.2d 332, 336 (7th Cir. 1959)). The Court explained that “[s]uch a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents.” *Kordel*, 397 U.S. at 8. Nor may a corporate officer rely on the Fifth Amendment to avoid producing corporate records he holds in a representative capacity, even if those records might incriminate him. *Braswell v. United States*, 487 U.S. 99, 108-09 (1988).

In sum, there is no basis to quash the CIDs on Fifth Amendment grounds.

⁴ Indeed, even where there is no such person at the company who can testify, the company must retain a person with whom it was not previously associated and provide that person with sufficient knowledge to be able to testify on the company’s behalf. *See, e.g., City of Chicago, Ill., v. Wolf*, No. 91 C 8161, 1993 WL 177020, at *1-2 (N.D. Ill. May 21, 1993) (“The corporations, however, can be compelled to answer the [30(b)(6)] questions through an agent who will not invoke the privilege”) (citations omitted); *Martinez v. Majestic Farms, Inc.*, No. 05-60833-CIV, 2008 WL 239164, at *2 (S.D. Fla. Jan. 28, 2008) (citing *Wolf*). To avoid prejudicing the employee who has a legitimate Fifth Amendment right from testifying indirectly through the designated representative, the employee would not be required to provide information to the corporate designee that is solely contained in the employee’s memory and is not implied by a document. *Martinez*, 2008 WL 239164, at *3; *Wolf*, 1993 WL 177020, at *2.

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B. A stay of the Commission's investigations is not warranted

The companies relatedly contend that the Commission should stay its investigations of the two companies pending resolution of the criminal investigations. Pet. 10-16. We deny that request for many of the same reasons discussed above.

“[T]he Constitution rarely, if ever, requires * * * ‘a stay of civil proceedings pending the outcome of criminal proceedings.’” *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012) (citing *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986) (internal quotation omitted)). Indeed, “‘a stay of a civil case’ to permit conclusion of a related criminal prosecution has been characterized as ‘an extraordinary remedy,’” although a court has the discretion to do so “when related criminal proceedings are imminent or pending, * * *.” *Id.* (citations omitted). The party seeking such “a stay ‘bears the burden of establishing its need.’” *Id.* at 97 (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). And contrary to the companies’ suggestion, Pet. 12, a criminal defendant “has no absolute right” to remain free “to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.” To the contrary, it is “permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege,” and “it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).⁵

Courts consider a number of factors when deciding whether to stay a civil proceeding pending a criminal matter. These include: (1) the status of the criminal case, including whether the defendants have been indicted and their Fifth Amendment rights

⁵ Contrary to the companies’ contentions, Pet. 5, there is nothing improper with the FTC sharing information it receives pursuant to process with another domestic or foreign law enforcement agency if the information is used for official law enforcement purposes as authorized by the FTC Act, 15 U.S.C. §§ 46(f), 57b-2(b)(6), and 16 C.F.R. §§ 4.11(c) and (j).

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are implicated;⁶ (2) the plaintiff's interest in proceeding expeditiously in the civil matter and the potential prejudice to the plaintiff of a delay; (3) the extent to which the issues in the criminal and civil cases overlap; (4) the private interests of and burden on the defendants; (5) the interests of non-parties and the public; and (6) the convenience to the court and judicial economy. *See Malletier*, 676 F.3d at 99-100 & nn.13-14 (declining to stay civil counterfeiting case pending related criminal proceeding); *Keating*, 45 F.3d at 324-25 (declining to stay civil case pending resolution of criminal action because burden on the defendant was outweighed by "the public's interest in a speedy resolution of the [civil] controversy") (citing *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902-03 (9th Cir. 1989)); *see also Dresser Industries*, 628 F.2d at 1374 (allowing parallel civil and criminal suits to continue "[i]n the absence of substantial prejudice to the rights of the parties involved, * * *").

Those factors plainly counsel against a stay here. First, as discussed above, petitioners point only to possible future criminal proceedings; neither the companies themselves nor their owners have been indicted—and they have shown no genuine threat of criminal liability at this point. Even if they did, no Fifth Amendment rights would be implicated by our investigation of the companies, because the companies have no Fifth Amendment rights as explained above. The very cases cited by petitioners recognize that "a stay in a civil proceeding when no indictment has yet issued in the criminal proceeding is rare, * * *." *SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1327 (N.D. Ala. 2003). While some courts have granted pre-indictment stays, Pet. 12-13,

⁶ The strongest case for staying a civil proceeding is where the defendant "is already under indictment for a serious criminal offense" involving the same matter, *Malletier*, 676 F.3d at 101; *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980), or at least is facing a "real and appreciable" risk of criminal liability. *Kordel*, 397 U.S. at 9. But as discussed below, courts often decline to stay civil cases even in the face of related criminal proceedings. By contrast, "[p]re-indictment requests to stay parallel civil litigation are routinely denied." *United States v. Bauer*, No. 1:14-CV-1660, 2014 WL 5493184, at *2 (M.D. Pa. Oct. 30, 2014) (citations omitted). "[T]he risk of self-incrimination is reduced at the pre-indictment stage," and it is uncertain "when, if ever, indictments will be issued." *State Farm Mut. Auto. Ins. Co. v. Beckham-Easley*, No. CIV.A 01-5530, 2002 WL 31111766, at *2 (E.D. Pa. Sept. 18, 2002) (citations omitted).

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those cases nearly always involved imminent or near-certain indictments. *See, e.g., Chao v. Fleming*, 498 F. Supp. 2d 1034, 1039-40 (W.D. Mich. 2007) (granting short stay of civil case where government had indicated “that it has sufficient evidence to seek an indictment,” such that an indictment was “but ‘an eventuality’”); *Healthsouth*, 261 F. Supp. 2d at 1326 (stay issued in civil case where indictment is “but an eventuality”).

Further, both the Commission and the public have a very strong interest that the civil investigation proceed expeditiously given the potentially false claims made by the companies that their products can prevent and treat a variety of serious health conditions. *See, e.g., Kordel*, 397 U.S. at 11 (denying stay of civil action that sought to prevent distribution of misbranded drugs); *Dresser Industries*, 628 F.2d at 1377 (denying stay where doing so might permit the “[d]issemination of false or misleading information by companies” to investors). The Commission and the public would be prejudiced by being “force[d] * * * to wait until the unknown culmination of a criminal case, for which no indictment has even been issued.” *FTC v. Adept Mgmt., Inc.*, No 1:16-cv-00720-CL, 2017 WL 722586, at *4 (D. Or. Feb. 23, 2017).

For these reasons, we deny the companies’ request to stay the Commission’s investigations pending resolution of the criminal investigations.

C. The CIDs properly seek testimony in Florida

Petitioners assert that they cannot be compelled to provide testimony in Florida. The CIDs require each company to provide oral testimony where the company “resides, is found, or transacts business.” 15 U.S.C. § 57b-1(c)(14)(C). Both companies previously stated in their August 2017 CID interrogatory responses that the “principal address” for each one is in Florida: Nordic Clinical in Fort Lauderdale and Encore Plus in Miami. Now, in direct contrast to these answers, they claim they principally conduct business in Montreal. Pet. 2. Petitioners having previously told us that their principal addresses were both in Florida, we see no reason why they cannot designate a witness to testify there.

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III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Nordic Clinical, Inc. and Encore Plus Solutions, Inc. to Stay Civil Investigation and Quash Civil Investigative Demands be, and it hereby is, **DENIED**, and

IT IS FURTHER ORDERED THAT Petitioners Nordic Clinical, Inc. and Encore Plus Solutions, Inc., shall comply with the Commission's CIDs and designate a corporate representative who will testify on their behalf, on a date set after consultation with Commission staff.

By the Commission.

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**CORPUS CHRISTI POLYMERS LLC,
ALFA S.A.B. DE C.V.,
INDORAMA VENTURES PLC,
FAR EASTERN NEW CENTURY
CORPORATION,
ALOKE LOHIA
AND
SUCHITRA LOHIA**

FTC File No. 181 0030 – Decision, June 26, 2018

RESPONSE TO BANIBU II HOLDINGS, INC.’S PETITION
TO LIMIT OR QUASH SUBPOENAS DATED MAY 7, 2018

By SLAUGHTER, Commissioner:

Banibu II Holdings, Inc. (“Banibu”) has filed a petition to limit and quash a subpoena *duces tecum* (“SDT”) and a subpoena *ad testificandum* (“SAT”) issued by the Commission on May 7, 2018. The SDT and SAT ask “the Company” – defined to include Banibu, its parents (most notably, Banco Inbursa, S.A. (“Inbursa”)), and its officers and employees – to produce documents and provide testimony. Inbursa created Banibu for the sole purpose of bidding in a bankruptcy auction for certain manufacturing assets in Corpus Christi, Texas. Banibu refuses to provide, however, what it considers to be “Inbursa-related” information.

Banibu’s petition to limit and quash advances three arguments: (1) that the request for any documents maintained by Inbursa is not valid because Inbursa was not served in Mexico; (2) that Banibu does not possess or control subpoenaed documents maintained by Inbursa; and (3) that the Federal Trade Commission (“FTC” or “Commission”) lacks the authority to compel Banibu’s Mexican principals to travel to the United States to testify at an investigational hearing. For the reasons described below, we deny Banibu’s petition to limit and quash, although we modify the location of the SAT.

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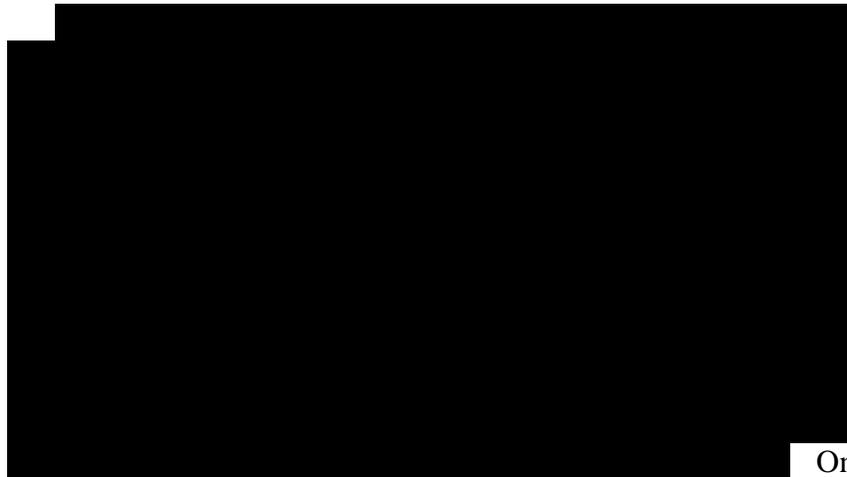
I. BACKGROUND

The FTC is investigating a proposed acquisition of a Corpus Christi-based production facility for polyethylene terephthalate (“PET”) resin, a plastic polymer used to make synthetic clothing fibers (referred to by its common name, polyester), bottles, and food packaging. The North American PET resin market is highly concentrated and dominated by only a few market participants.

The transaction under investigation arises out of a bankruptcy proceeding. M&G USA Corporation, Inc. (“M&G”), an American subsidiary of an Italian corporation, was building, in Corpus Christi, Texas, what was expected to be the largest and most efficient vertically integrated PET resin facility in North America. Before the project was completed, M&G filed for Chapter 11 bankruptcy protection on October 30, 2017. *In re: M&G USA Corp.*, No. 17-12307-BLS (Bankr. D. Del.). On March 29, 2018, the bankruptcy court approved the sale of the Corpus Christi assets for \$1.1 billion to a trilateral joint venture named Corpus Christi Polymers LLC, consisting of Indorama Ventures USA (“Indorama”), DAK Americas LLC (“DAK”), and Far Eastern New Century Corporation. FTC staff is investigating the potential competitive effects of this proposed transaction. The bankruptcy court also approved Banibu as the backup bidder for the Corpus Christi assets. *See M&G USA Corp.*, *supra* (Doc. No. 1300). Banibu will acquire the assets if the joint venture fails to close the transaction.

On February 27, 2018, Inbursa, a Mexican financial institution, created Banibu, a Delaware corporation, as its wholly owned subsidiary, specifically to bid on the Corpus Christi assets. Pet. 2-3. Banibu has four directors, who also serve as its only officers: Javier Foncerrada Izquierdo (President), Luis Roberto Frias Humphrey (Vice President, Treasurer), Guillermo Rene Caballero Padilla (Vice President, Secretary), and Frank Ernesto Aguado Martinez (Vice President). Pet. 3. These same four individuals are also officers, directors, or senior employees of Inbursa. Inbursa was the principal lender for M&G’s PET resin facility project, and it is the primary lienholder and largest secured creditor on the Corpus Christi assets. [REDACTED]

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On March 12, 2018, GFI filed the required pre-merger notification, regarding Banibu's bid for the Corpus Christi assets, to the Commission under the Hart-Scott-Rodino Act. *See* 16 C.F.R. pt. 803.

Pursuant to its investigation, on May 7, 2018, the Commission issued two substantively identical subpoenas to Banibu – one for documents and one for testimony. Pet. Exhs. A, B.¹ On May 9, 2018, the SDT and SAT were served via FedEx to Banibu's antitrust counsel in Washington, D.C. Both subpoenas ask about: "the Company's" financial interest in, rationale for bidding on, and evaluation of, the Corpus Christi assets; communications with M&G, other lienholders, bidders, potential bidders, and any other persons about the potential acquisition of the Corpus Christi assets or the bankruptcy proceeding; plans for the assets, should

¹ The SDT and SAT were issued pursuant to a January 11, 2018 resolution authorizing compulsory process to investigate whether the proposed acquisition of the Corpus Christi assets by Indorama and/or DAK would violate the FTC Act or the Clayton Act. *See* Pet. Exhs. A (last page), B (last page).

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the Company acquire them (including whether the Company intends to operate or sell the assets); and an April 17, 2018 letter from Inbursa's counsel to FTC staff concerning the bid and the Company's future plans regarding the assets. This information is relevant to the Commission's investigation. Among other things, it will enable an assessment of what would likely happen to the assets if Banibu acquired them as the backup bidder, and in analyzing any "failing firm" defense that the joint venture might raise. The SAT requests that the Company designate a person "to testify on its behalf," pursuant to Commission Rule 2.7(h), 16 C.F.R. § 2.7(h).

On May 17, 2018, Banibu filed its petition to limit and quash the SDT and SAT. It asserts it will produce responsive non-privileged documents it possesses or controls (including "documents relating to its formation, bid proposal, and related business," Pet. 5), but not documents within the possession, custody, or control of its parent Inbursa (and presumably GFI). Banibu also requests that the SAT be quashed, because all of its corporate representatives are Mexican nationals residing in Mexico.

II. ANALYSIS

A. The subpoena *duces tecum* should be enforced.

Under Section 9 of the FTC Act, 15 U.S.C. § 49, the Commission has the authority "to require by subpoena. . . the production of. . . documentary evidence relating to any matter under investigation . . . from any place in the United States, at any designated place of hearing. . . ." *See also* 16 C.F.R. § 2.7(c) (FTC's implementing rule). We have held that Section 9 authorizes subpoenas, issued both in agency investigations and in administrative adjudicatory proceedings, for testimony and documents located abroad if the subpoena is served properly on a domestic corporation over which the Commission has jurisdiction. *See In re Petition to Quash Subpoena, Nippon Sheet Glass Co.*, 113 F.T.C. 1202, 1204, 1209 (1990) (Section 9 provides authority to serve an investigational subpoena on the U.S. agent or alter ego of a foreign entity); *In re General Foods Corp.*, 95 F.T.C. 383, 383-384, 1980 WL 339002, at *1 (1980) ("Section 9 authorizes

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the Commission to subpoena documents located abroad, as well as documents located anywhere within the United States.”) (citations omitted). Courts analyzing identical language in other statutes likewise have held that the language did not limit an agency’s ability to subpoena documents located abroad in response to an administrative subpoena validly served in the United States. *See Federal Maritime Comm’n v. DeSmedt*, 366 F.2d 464, 471 (2d Cir. 1966) (agency could “require a resident by subpoena to produce documents under his control wherever they are located” pursuant to a statute authorizing the agency to compel documents “from any place in the United States.”); *SEC v. Minas de Artemisia, S.A.*, 150 F.2d 215, 217-18 (9th Cir. 1945) (court could enforce an SEC subpoena for the production of books and records located in Mexico, “provided only that service of the subpoena is made within the territorial limits of the United States” where the statute authorized the SEC to require the production of documents “from any place in the United States.”).

1. Banibu must produce documents in its possession, custody, or control.

While Section 9 itself does not expressly define the scope of a document demand, we are guided by analogous law that the person subpoenaed must produce responsive non-privileged documents within its “possession, custody, or control.” *See, e.g.*, 15 U.S.C. § 57b-1(c)(1) (FTC’s civil investigative demands); Fed. R. Civ. P. 34(a), 45(a) (party and nonparty production in federal civil litigation). Thus, Banibu – a Delaware corporation, whose principal place of business is in Corpus Christi, Texas – must produce all documents within its possession, custody, or control, even if those documents are located abroad or held by a foreign parent. *See, e.g., United States v. First Nat’l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968) (requiring production of documents from German branch of United States bank in criminal antitrust investigation, holding that “a federal court has the power to require the production of documents located in foreign countries if the court has *in personam* jurisdiction of the person [corporation] in possession or control of the material”) (citation omitted); *Camden Iron and Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438, 442-44 (D.N.J. 1991) (United States subsidiary had control of documents possessed by Japanese parent

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relating to transaction); *NML Capital Ltd. v. Republic of Argentina*, No. 2:14-cv-492-RFB-VCF, 2014 WL 3898021, at *10 (D. Nev. Aug. 11, 2014) (federal court's subpoena power under Rule 45 "reaches all documents – no matter where they are located – that are within a resident corporation's custody or control") (citation omitted); *see also* 9A Charles Alan Wright and Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2456 (3d ed. April 2018 update) (records kept beyond the territorial jurisdiction of the issuing court are covered by Rule 45 if they are controlled by a person, including a corporation, subject to the court's jurisdiction).

Banibu argues that the SDT is invalid to the extent it asks for documents from Inbursa because the FTC did not serve Inbursa pursuant to the Hague Convention, which it asserts is the only authorized method to obtain such materials from the Mexican company. Pet. 6-7. To support this argument, Banibu relies on cases that quashed compulsory process where an individual or corporation was improperly served outside of the United States. *See, e.g., CFTC v. Nahas*, 738 F.2d 487, 493-95 (D.C. Cir. 1984) (administrative subpoena improperly served on a Brazilian citizen in Brazil where the agency lacked statutory authority to serve subpoena extraterritorially); *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (service of FTC investigatory subpoena by registered mail on French company in France was unauthorized as it was not the customary and legitimate method of serving administrative compulsory service abroad). But here the Commission lawfully served its subpoena in the United States on Banibu, a Delaware corporation, which is obligated to produce all documents within its possession, custody, or control, whether or not its Mexican parent Inbursa maintains those materials.

2. Documents maintained by Inbursa are in Banibu's possession, custody, or control.

Banibu next argues that it does not possess or have control over Inbursa or its documents. Pet. 8-9. We agree with Banibu that the separate corporate identities of parent and subsidiary ordinarily should be respected. We conclude, however, that

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Banibu has an obligation to produce documents it argues belongs to Inbursa for two reasons.

First, it is very likely that Banibu's principals possess many of the requested documents, even beyond the specific Banibu-related documents that it has or has stated it will produce. The SDT is narrowly focused on documents relating to the Corpus Christi assets, including why the Company bid on the assets, its evaluation of and plans for those assets, and its discussions with M&G, other lienholders, bidders, and potential bidders. Thus, responsive documents relating to the topics in the SDT possessed by Banibu's four principals must be produced. *See, e.g., General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973) ("knowledge of officers and employees of [defendant corporation], relevant to the subject matter of the instant cause, is imputed to the corporation itself.") (citation omitted); *see also Gerling Int'l Ins. Co. v. Comm'r of Internal Revenue*, 839 F.2d 131, 138 (3d Cir. 1988) ("knowledge of officers and key employees of a corporation, if relevant to the subject matter of an interrogatory or production request direct to the corporation, may be imputed to the corporation itself.") (citations omitted).² Banibu's four officers and directors are also officers, directors, or senior employees of Inbursa, which has a major investment stake in the Corpus Christi assets, and were directly involved in Banibu's bid for the Corpus Christi assets.³ Indeed, [REDACTED]

² At the same time, we are unpersuaded by Banibu's reliance on *Gerling* to support its petition. *See* Pet. 9. In *Gerling*, the Third Circuit held that the president of a Delaware corporation, which had a contractual relationship as a reinsurer of a Swiss insurance company, had no obligation to disclose the extent of his holdings in the Swiss company, which he owned in his *personal* capacity. 839 F.2d at 139. Indeed, *Gerling* reiterated the well-established principle that corporate officers and directors have an obligation to provide business information they possess *on behalf of the corporation* they operate, but not personal information obtained outside the scope of their official duties. *See id.* ("Nothing in the record suggests that Gerling's ownership in [the Swiss company] has anything to do with the business of [the Delaware company]"). Here, the SDT is only requesting documents from Banibu and its officers and directors in their official, not personal, capacities.

³ [REDACTED]

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[REDACTED] and the Asset Purchase Agreement submitted with Banibu's bid indicated that all notices and communications should be directed to Messrs. Frias and Caballero. See *M&G USA Corp.*, *supra* (Doc. No. 1277-13 at PDF pg. 100) (Exh. H-1 at 94).

Second, we conclude that Banibu has the requisite control over all the documents responsive to the SDT, including those maintained by Inbursa. As Banibu acknowledges, an entity has the requisite "control" of documents if it has the "the legal right, authority or ability to obtain documents upon demand." Pet. 8 (quoting *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005) (citation omitted)); accord *Bush v. Ruth's Chris Steak House, Inc.*, 286 F.R.D. 1, 5 (D.D.C. 2012) ("Control does not require that the party have legal ownership or actual physical possession of the documents at issue, but rather 'the right, authority or practical ability to obtain the documents from a non-party to the action.'" (citation omitted); *Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179-PRM, 2018 WL 2348669, at *2 (W.D. Tex. May 23, 2018) (same) (citations omitted); *Shell Global Solutions (US) Inc. v. RMS Eng'g, Inc.*, No. 4:09-cv-3778, 2011 WL 3418396, at *2 (S.D. Tex. Aug. 3, 2011) (same) (citations omitted). The D.C. Circuit has recognized five instances in which a subsidiary has the requisite control over documents in its parent corporation's possession, more specifically where:

- (1) the alter ego doctrine ... warranted 'piercing the corporate veil';
- (2) the subsidiary was an agent of the parent in the transaction giving rise to the lawsuit;
- (3) [t]he relationship is such that the agent-subsiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation;
- (4) [t]here is access to documents when the need arises in the ordinary course of business; [or]

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(5) [the] subsidiary was [a] marketer and servicer of the parent's product. . . in the United States.

ASAT, 411 F.3d at 254 (citing *Camden Iron*, 138 F.R.D. at 441-42 (citing *Gerling*, 839 F.2d at 140-41)); accord *CMACO Auto. Systems, Inc. v. Wanxiang America Corp.*, No. 05-60087, 2007 WL 656893, at *2 (E.D. Mich. Feb. 26, 2007) (citing *Camden Iron* and applying same factors), *aff'd*, 2007 WL 2331863 (E.D. Mich. Aug. 13, 2007); *Shell Global*, 2011 WL 3418396, at *2 (applying similar factors) (citation omitted); *Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998) (applying similar grounds to conclude that subsidiary may be required to produce parent's documents where there is sufficient "intermingling of directors, officers, or employees, or business relations."). A finding of any one of the five factors can satisfy the "control" requirement. See *Camden Iron*, 138 F.R.D. at 441; *Pitney Bowes, Inc. v. Kern Intern., Inc.*, 239 F.R.D. 62, 66-67 (D. Conn. 2006). The party seeking the documents has the burden to show that the subsidiary controls the parent's documents. *ASAT*, 411 F.3d at 254.

We conclude that the *ASAT* factors demonstrate that Banibu "controls" the documents requested in the SDT, even if they are nominally possessed by Inbursa. Documents produced in the bankruptcy proceeding, and those reflecting communications both before and after the bankruptcy auction, reveal that Banibu is acting as Inbursa's agent "in the transaction giving rise to" a portion of the Commission's investigation – Banibu's potential acquisition of the Corpus Christi assets (satisfying the second *ASAT* factor). Inbursa created Banibu as a shell corporation, for the express purpose of bidding on the Corpus Christi assets, installed its own principals as Banibu's principals, [REDACTED]

[REDACTED] Further, as noted above, [REDACTED]

[REDACTED] and those regarding Banibu's asset purchase agreement with Messrs. Frias and Caballero.

Satisfaction of the second *ASAT* factor is sufficient to find that Banibu has the requisite control over the requested documents.

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But, additionally, we conclude that given Banibu's purpose and Inbursa and Banibu's close relationship, including overlapping officers, directors, and employees, it is highly likely that Banibu would have access to Inbursa's documents regarding its potential acquisition of the Corpus Christi assets "when the need arises in the ordinary course of business," and the ability to "secure documents of [Inbursa] to meet its own business needs" – even those prepared before Banibu was created. This satisfies the third and fourth *ASAT* factors.

The documents sought in the SDT relate specifically to the activities for which Inbursa incorporated Banibu and its plans for the assets should it obtain them. While Banibu has produced some documents relating to the bid itself, it claims not to possess or have control over documents relating to other aspects of the Corpus Christi assets that are important to the FTC staff's investigation (particularly those created prior to Banibu's creation), such as how Inbursa valued the assets and came up with its bid amount, what its future plans are for the site, and what return it expects if it obtains the assets and sells them. These are relevant documents for the Commission's investigation and must be produced pursuant to the SDT.

Inbursa should not be able to create a shell corporation as an acquisition vehicle under the protection of United States law with the express purpose of engaging in a significant business transaction here, yet disclaim any obligation to respond to valid law enforcement inquiries about that proposed transaction. Banibu was created for the sole purpose of doing business in the United States on behalf of its principal Inbursa and should not be allowed to evade law enforcement inquiries due to such machinations. In sum, we find there is a sufficient "nexus between the subpoenaed documents and [Banibu's] relationship with [Inbursa], taking into account, among other things, [Banibu's] business responsibilities," *ASAT*, 411 F.3d at 255, to support our conclusion that Banibu controls the requested documents.⁴

⁴ Indeed, these facts may show that Banibu was Inbursa's alter ego for purposes of the Corpus Christi asset transaction such that the corporate veil between them should be pierced to allow Commission access to the documents.

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Courts have found sufficient control by subsidiaries over documents nominally possessed by their parent corporations in situations very similar to here. *See, e.g., Camden Iron*, 138 F.R.D. at 442-44 (finding control by wholly owned domestic subsidiary of transaction-related documents possessed by its foreign parent, which played a significant role in setting up and benefitting from transaction and where subsidiary obtained documents relating to transaction from parent in the normal course of business, even where there was little overlap of the companies' officers and directors); *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919-20 (S.D.N.Y. 1984) (finding control by a domestic distributor and service company over subpoenaed service manual and blueprint documents possessed by foreign airplane manufacturer affiliate such that it would have been "inconceivable that [the domestic company] would not have access to these documents and the ability to obtain them for its usual business."); *CMACO Auto. Syst.*, 2007 WL 656893, at *2 (holding that domestic subsidiary controlled subpoenaed documents held by foreign counterparts under the second, third, and fourth ASAT factors); *see also Ysleta del Sur Pueblo*, 2018 WL 2348669, at *3 (defendant Indian tribe controlled documents held by nominally independent tribal fraternal organization because tribe had legal right and practical ability to obtain documents, where organization was "wholly controlled" by tribe and tribal official was also official of the organization with apparent access to the requested documents).

The cases upon which Banibu relies in its petition present circumstances distinguishable from the instant case. In those cases, courts found insufficient control by the domestic subsidiary over its foreign parent's documents where the subsidiary did not have routine access to the subpoenaed documents, which were unrelated to the subsidiary's business activities. *See, e.g., ASAT*, 411 F.3d at 255 (finding lack of control by subsidiary of documents possessed by foreign parent because "[i]t is quite conceivable that [the subsidiary] does not have routine access to [its foreign parents' subpoenaed] documents because they do not seem to relate directly to its principal activities."); *Power*

But we need not make that finding to conclude that Banibu has sufficient control over the requested documents to comply with the SDT.

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Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc., 233 F.R.D. 143, 145-46 (D. Del. 2005) (finding lack of control where domestic subsidiary had arms-length vendor relationship with foreign parent and subsidiary did not use the subpoenaed information “in the normal course of its business”). The current matter is more analogous to those cases finding the domestic subsidiary controls documents maintained or possessed by a parent corporation, given the complete overlap of Banibu’s officers and directors with Inbursa, the interconnectedness of Inbursa’s and Banibu’s business interests and activities regarding the Corpus Christi assets, and the SDT’s request for documents relating specifically to those assets. For these reasons, we reject Banibu’s objections and deny its petition to quash the SDT.

B. The subpoena *ad testificandum* should be enforced.

Banibu also argues that the SAT must be quashed because it exceeds the Commission’s Section 9 subpoena authority by “compel[ing] a Mexican national to travel to the United States and sit for a deposition.” Pet. 10-11. It relatedly argues, relying on Fed. R. Civ. P. 45, that it has “no representative within the jurisdictional reach of any U.S. district [court].” *Id.* Both arguments fail for the reasons described below.

1. The Commission’s subpoena authority under Section 9 compels testimony of Banibu’s officers, directors, or managing agents, or designees who consent, to testify on its behalf.

Like its authority to require the production of relevant documentary materials, the Commission has broad authority to require the testimony of United States corporations in furtherance of its investigations. *See supra* at 3. Under Section 9 of the FTC Act, the Commission has the “power to require by subpoena the attendance and testimony of witnesses. . . relating to any matter under investigation. . . . Such attendance of witnesses. . . may be required from any place in the United States, at any designated place of hearing. . . . The Commission may order testimony to be taken by deposition in any proceeding or investigation . . . at any stage of such proceeding or investigation. . . .” 15 U.S.C. § 49; *see also* 16 C.F.R. § 2.7(c) (FTC’s implementing rule). When the

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Commission issues a subpoena for oral testimony from a corporate entity, “the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify *on its behalf*. . . .” 16 C.F.R. § 2.7(h) (emphasis added); *cf.* Fed. R. Civ. P. 30(b)(6) (applying similar language for corporate depositions in federal civil discovery). The witnesses appear on behalf of “the Company,” not in their individual capacities.

Banibu asserts that the Commission “has no power to subpoena an alien nonresident to appear before it from a foreign land.” Pet. 10 (quoting *Nahas*, 738 F.2d at 495 (quoting *SEC v. Zanganeh*, 470 F. Supp. 1307 (D.D.C. 1978))). The cases on which Banibu relies involve service on a foreign national on foreign soil (*Nahas*) or service in the United States requiring a particular nonresident alien to appear before the agency from a foreign land (*Zanganeh*). But here, the Commission subpoenaed Banibu – a Delaware corporation, whose principal business activity is related to its bid on the Corpus Christi assets in Texas. Banibu is indisputably within the Commission’s subpoena authority. The SAT seeks testimony from knowledgeable corporate officers, directors, managing agents, or designees, not particular individuals located in Mexico, personally. While Banibu may designate its Mexican officers to testify on its behalf, the SAT does not require it to do so.

2. Banibu’s invocation of Fed. R. Civ. P. 30(b)(6) and 45 is unavailing.

Banibu further argues, citing Fed. R. Civ. P. 30(b)(6) and 45(c), that the SAT must be quashed because Banibu does not employ anyone within 100 miles of any United States judicial district. Pet. 10-11. It cites no authority, however, that the Commission’s subpoena authority under Section 9 of the FTC Act is subject to Rule 45’s territorial limits. Indeed, as noted above, Section 9 explicitly states that witness testimony “may be required from any place in the United States, at any designated place of hearing.”

But, as noted above, even if we were to consider the Federal Rules of Civil Procedure as guidance for our investigatory

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subpoenas, Banibu's argument still fails. Rule 45(c)(1)(A) limits a subpoena issued to a nonparty to testify "within 100 miles of where the person resides, is employed, or regularly transacts business in person." The cases relied upon by Banibu simply stand for the unremarkable proposition that a nonparty nonresident organization cannot be compelled to designate a suitable employee to testify who works over 100 miles from the district where the litigation is pending or a deposition is noticed. *See, e.g., Estate of Klieman v. Palestinian Auth.*, 293 F.R.D. 235, 239 (D.D.C. 2013) (subpoena issued to the BBC based in the United Kingdom where relevant documentary was produced), order stayed on other grounds, 18 F. Supp. 3d 4 (D.D.C. 2014); *Krueger Invs. LLC v. Cardinal Health 110, Inc.*, No. CV 12-0618-PHX-JAT, 2012 WL 3264524, at *3 (D. Ariz. Aug. 9, 2012) (no responsive DEA witness worked within 100 miles of Arizona litigation). But the subpoenas were issued to Banibu, a domestic corporation over which the Commission indisputably has jurisdiction. Thus, even using Rule 45(c)(1)(A) as guidance (which we are not obliged to do given the language of Section 9), Banibu needs to designate an officer, director, managing agent, or other person to testify on its behalf, who resides, works, or regularly transacts business within 100 miles of a suitable investigational hearing location.

While Banibu claims that all four of its officers and directors are Mexican nationals who work and reside in Mexico, Pet. 3, Exh. C ¶ 4, Banibu has an affirmative obligation to "select a designee and educate her in accordance with its duty" to designate a corporate deponent whose testimony "represents the knowledge of the corporation," because "the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation." *Wultz v. Bank of China Ltd.*, 298 F.R.D. 91, 99 (S.D.N.Y. 2014) (citations omitted); *accord NML Capital*, 2014 WL 3898021, at *10 ("the unique status of the corporate person permits a federal court to compel a non-party resident corporation to designate a nonresident employee to 'thoroughly educate' an in-forum employee to testify on the corporation's behalf") (citing *Wultz*); *Rahman v. The Smith & Wollensky Rest. Group, Inc.*, No. 06 Civ. 6198LAKJCF, 2009 WL 773344, at *1 (S.D.N.Y. Mar. 18, 2009) ("A corporation has an affirmative duty to prepare the designee 'to the extent matters

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are reasonably available, whether from documents, past employees, or other sources.”) (citations omitted). In *Wultz*, the court found that requiring a nonparty bank in Israel with a New York branch office, to educate a person in New York to comply with a corporate subpoena, did not impose an undue burden. 298 F.R.D. at 99. Therefore, Banibu must either send one of its four Mexican officers to the United States to testify, or designate and prepare a person with relevant knowledge to testify on its behalf.⁵

Finally, we note that one court, in requiring a foreign witness to travel more than 100 miles, from abroad, to testify on behalf of nonparty resident shell corporations, observed that “[a] company cannot purposefully avail itself of the law’s benefits by incorporating in this jurisdiction and then excuse itself from the court’s subpoena power by abusing the corporate form. This would allow a corporation to exploit the benefits created by the law without shouldering the concomitant burdens and responsibilities imposed by the law.” *NML Capital*, 2014 WL 3898021, at *11-*12 (observing that shell corporations “exalt artifice above reality,” citing *Abramski v. United States*, 134 S. Ct. 2259, 2270 (2014)). While we do not suggest that Inbursa incorporated Banibu for a nefarious purpose, we conclude that similar considerations apply here. Foreign companies that operate in the United States through shell companies, enjoying the benefits and protections of United States law, and engaging in significant domestic transactions, should not be permitted to shield their officers or directors with knowledge of the transaction from the reach of a United States law enforcement investigation. Nothing indicates that Congress intended to limit the Commission’s investigatory subpoena authority under Section 9 in the manner that Banibu suggests.

For the reasons described above, we deny Banibu’s motion to quash the SAT. While we are not bound by the Federal Rules of Civil Procedure, in an effort to lessen the burden on witnesses consistent with the purposes underlying Rule 45(c), we are modifying the place for the investigative hearing, and order that it

⁵ Indeed, we note that the Company retains several agents working in the United States in various consulting and advisory roles, including the Company’s attorneys and corporate restructuring consultants.

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take place within 100 miles of either Corpus Christi, Texas (where Banibu transacts business) or Wilmington, Delaware (where Banibu is incorporated), or at another place in the United States agreed to by the parties.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Banibu II Holdings, Inc.'s Petition to Limit and Quash Subpoena Duces Tecum and Subpoena Ad Testificandum Dated May 7, 2018 be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Banibu II Holdings, Inc. shall comply in full with the Commission's subpoena *duces tecum* by 10 days from the date of this order; and shall appear to testify on the topics in the subpoena *ad testificandum* at a mutually agreeable date and location, which is within 100 miles of either Corpus Christi, Texas or Wilmington, Delaware, or at another place in the United States agreed to by the parties.

By the Commission.

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